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82-374

No.

IN THE

Supreme Court of the United States

October Term, 1982

ROBERT FLANAGAN,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

JAMES KEWESHAN,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

JOSEPH LANDIS,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

THOMAS McNAMEE,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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195

QUESTIONS PRESENTED

1. Whether the panel opinion denying Petitioners the counsel of their choice to present their common defense due to potential conflicts of interest, despite a valid waiver of such conflicts, is inconsistent with the decisions of this Court?

2. Whether the panel opinion denying Petitioners the counsel of their choice to present their common defense due to potential conflicts, is contrary to the decisions of every other circuit which has addressed this issue?

3. Whether Fed. R. Crim. P. 44(c) permits a court to undercut Petitioners' constitutionally protected choice of retained counsel?

4. Whether the panel opinion below precludes the presentation of a common defense, regardless of the number or affiliation of counsel?

5. Whether the panel opinion below undermines the ability of clients to consult with and retain counsel of their choice?

6. Whether resolution of the issues posed will substantially diminish the workload of all federal courts?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF PROCEDURE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
The Panel Opinion Denying Petitioners the Counsel of Their Choice to Present Their Common Defense Due to Potential Conflicts of Interest, Despite a Valid Waiver of Such Conflicts, Is Inconsistent With the Decisions of This Court	9
Every Other Circuit Holds That Defendants' Choice of Counsel May Not Be Undercut by the Court So Long as There Is a Valid Sixth Amendment Waiver, Even Absent a Common Defense	12
Rule 44(c) Does Not Permit a Court to Undercut Petitioners' Constitutionally Protected Choice of Retained Counsel	18
The Opinion Below Precludes the Presentation of a Common Defense	22
The Panel Opinion Undermines the Ability of Clients to Consult With and Retain Counsel of Their Choice	23
Resolution of the Issues Posed Herein Will Substantially Diminish the Workload of All Federal Courts	24
CONCLUSION	26

TABLE OF AUTHORITIES

Cases: Page

Balkcom v. Baty, No. 81-1587, *cert. denied*, 50 U. S. L. W. 3943, June 1, 1982 25

Broderick v. United States, No. 81-1647, *cert. denied*, 50 U. S. L. W. 3838, April 19, 1982 25

Crossman v. United States, No. 81-1825, *cert. denied*, 50 U. S. L. W. 3916, May 18, 1982 25

Cuyler v. Sullivan, 446 U. S. 335, 100 S. Ct. 1708 (1980) 10, 11, 12, 13, 15, 19

Duckworth v. Cowell, No. 81-1038, *cert. granted and judgment vacated and case remanded*, 50 U. S. L. W. 3715, March 8, 1982 25

Duckworth v. Serrano, No. 80-2041, *cert. granted, judgment vacated and case remanded with per curiam opinion*, 50 U. S. L. W. 3297, October 19, 1981 25

Dukes v. Warden, 406 U. S. 250 (1972) ..... 1'

Faretta v. California, 422 U. S. 806 (1975) 21

Glasser v. United States, 315 U. S. 60 (1942) 11, 13, 23

Greger v. United States, No. 81-1357, *cert. petition filed* 50 U. S. L. W. 3722 (January 19, 1982) 25

Holloway v. Arkansas, 435 U. S. 475 (1978) 10, 11, 13, 23

Hopper, Warden v. Johnson, No. 81-60, *cert. denied*, 50 U. S. L. W. 3352, November 2, 1981 25

Horowitz v. Florida, No. 81-254, *cert. denied*, 50 U. S. L. W. 3300, October 19, 1981 25

In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381 (S. D. N. Y. 1975) 22

Leader v. United States, No. 81-1165, *cert. denied*, 50 U. S. L. W. 3591, January 25, 1982 25

McLister v. United States, No. 81-1276, *cert. denied*, 50 U. S. L. W. 3695, March 1, 1982 25

Monius v. United States, No. 81-948, *cert. denied*, 50 U. S. L. W. 3487, December 14, 1981 25

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Monroe v. New York, No. 81-1188, *cert. denied*, 50 U. S. L. W. 3669, February 22, 1981 25

Myhrvold v. Sullivan, No. 81-377, *cert. denied*, 50 U. S. L. W. 3351, November 2, 1981 25

Scully v. Camera, No. 81-790, *cert. denied*, 50 U. S. L. W. 3487, December 14, 1981 25

Smith v. Bordenkircher, 671 F. 2d 936 (6th Cir. 1982) 15

Snyder v. Ohio, No. 80-2199, *cert. denied*, 50 U. S. L. W. 3246, October 5, 1981 25

United States ex rel. Davis v. McCann, 386 F. 2d 611 (2d Cir. 1967), *cert. denied*, 390 U. S. 958 (1968) 21

United States ex rel. Sullivan v. Cuyler, 593 F. 2d 512 (3d Cir. 1979) 9, 10

United States v. Agosto, 675 F. 2d 965 (8th Cir. 1982) 15, 16, 17, 18

United States v. Armedo-Sarmiento, 524 F. 2d 591 (2d Cir. 1975) 12, 20, 21

United States v. Cunningham, 672 F. 2d 1064 (2d Cir. 1982) .14, 22

United States v. Curcio, 680 F. 2d 881 (2d Cir. 1982) 12, 13, 14, 22

United States v. Debrow, 346 U. S. 374 (1953) 20

United States v. Garcia, 517 F. 2d 272 (5th Cir. 1975) ..12, 21, 22

United States v. Gray, 448 F. 2d 164 (9th Cir. 1971) 20

United States v. Jeffers, 520 F. 2d 1256 (7th Cir. 1975), *cert. denied*, 423 U. S. 1066 (1976) 17

United States v. Laura, 667 F. 2d 365 (3d Cir. 1981) 18

United States v. Mihalopoulos, 228 F. Supp. 994 (D. D. C. 1964) 19

United States v. Schwartz, 372 F. 2d 678 (4th Cir. 1967) ... 20

United States v. Sheiner, 410 F. 2d 337 (2d Cir.) *cert. denied*, 396 U. S. 825 (1969) 21

United States v. Wisneiwski, 478 F. 2d 274 (2d Cir. 1973) .. 21

Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253 20

TABLE OF AUTHORITIES (Continued)

Constitutional and Statutory Provisions and Rules of Procedure:

	Page
Fourth Amendment	24
Fifth Amendment	3, 8, 24
Sixth Amendment	*passim*
Fed. R. Crim. P. 44(c)	i, 3, 6, 10, 12, 13, 18, 19, 20, 22
18 U. S. C. §§ 241 and 242	21
28 U. S. C. § 1254(i)	2

Other Authorities:

Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 Geo. L. J. 1075, 1115 (1979) 17

TABLE OF CONTENTS OF JOINT APPENDIX

	Page
Order of the United States Court of Appeals for the Third Circuit entered July 23, 1982	A1
Panel Opinion of the United States Court of Appeals for the Third Circuit entered June 2, 1982	A2
Opinion of the United States District Court for the Eastern District of Pennsylvania dated December 2, 1981	A12
Order of the United States District Court for the Eastern District of Pennsylvania dated December 2, 1981	A29
Order of the United States District Court for the Eastern District of Pennsylvania dated December 4, 1981	A30
Judgment Order of the United States Court of Appeals for the Third Circuit entered June 2, 1982	A32
Order Denying Rehearing of the United States Court of Appeals for the Third Circuit entered July 12, 1982	A34
Transcript of Rule 44(c) Proceedings held before the United States District Court for the Eastern District of Pennsylvania on November 12, 1981	A36
Discussion	A36
Robert Flanagan	A46
James Keweshan	A51
Sidney Landis	A56
Thomas McNamee	A61
Discussion	A66

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners above named respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this case on June 2, 1982, petition for rehearing denied, July 12, 1982.

OPINIONS BELOW

The Opinion of the panel of the United States Court of Appeals for the Third Circuit, affirming the Opinion of the United States District Court for the Eastern District of Pennsylvania, is reported at 679 F. 2d 1072 (3d Cir. 1982). A copy of this Opinion is printed in the Appendix at A2.

The Judgment of the Third Circuit Court of Appeals, dated June 2, 1982, affirming the Judgment of the District Court entered December 4, 1981, is printed in the Appendix at A32.

The Orders of the Third Circuit Court of Appeals denying Petitions for a Rehearing and recalling its mandate erroneously issued are printed in the Appendix at A34, A1.

The Opinion of the United States District Court for the Eastern District of Pennsylvania, affirmed by the panel of the Third Circuit, is reported at 527 F. Supp. 902 (E. D. Pa. 1981). A copy of this Opinion is printed in the Appendix at A12.

The District Court's Order of December 2, 1981, granting the government's Motion to Prohibit Multiple Representation of Petitioners is unreported. A copy of this Order is printed in the Appendix at A29.

The District Court's Order of December 4, 1981, granting Petitioners' Motion for Reconsideration and/or Clarification, is not reported. A copy of this Order is printed in the Appendix at A30.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, printed in the Appendix at A32, was entered on June 2, 1982. On July 12, 1982, the Court denied a Petition for Rehearing filed by each of Petitioners herein, A34. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF PROCEDURE INVOLVED

United States Constitution:

Amendment V:

> No person shall . . . be deprived of life, liberty, or property without due process of law; . . .

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Federal Rule of Criminal Procedure 44(c):

> Whenever two or more defendants have been jointly charged . . . or have been joined for trial . . . , and are represented by the same retained . . . counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation, Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

STATEMENT OF THE CASE

Petitioners were members of the Philadelphia Police Department's "grandpop" squad, a decoy team comprised of volunteers assigned to the stake-out unit, which is designed to deal with street crime. The team decoy, posing as one aged and infirm, is expected to attract muggers and robbers who would otherwise feast upon those truly helpless. Petitioner Flanagan generally assumed the decoy role, with Petitioners McNamee, Keweshan and Landis providing protection and making arrests.

During the spring of 1981, Petitioners knew[1] that: (1) the Philadelphia District Attorney had begun an investigation into arrests made by the team to determine whether criminal charges should be lodged against them; (2) a federal grand jury had begun an investigation of the same arrests to determine whether federal charges should be lodged; and (3) the Internal Affairs Unit of the Philadelphia Police Department had begun its own investigation into the same arrests.[2] Moreover, while all three investigations were proceeding, Petitioners were called to Court, on numerous occasions, to testify at preliminary hearings and trials of defendants they had arrested, which arrests were the subject of these inquiries.

Each Petitioner independently determined that he needed counsel to assist him in dealing with the complex and confusing situation then unfolding. Each Petitioner decided that his own interests were best served by presenting a common front in the face of the investigations. On May 6, 1981, each Petitioner retained the firm of Sprague & Rubenstone to provide representation in each of these matters given each Petitioner's belief in the skill and expertise of the law firm's members. The law firm, after meeting with Petitioners jointly and separately, agreed that the best interests of each Petitioner were served through the presentation of a common defense and that no conflict of interest existed.

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1. On Sunday, February 1, 1981, the Philadelphia Inquirer ran a front page article purporting to investigate the propriety of certain arrests made by Petitioners' decoy team. As a result of this and a spate of other articles, Petitioners were reassigned by the Commissioner of Police to other police duties.

2. The District Attorney ultimately lodged no criminal charges against Petitioners. He dismissed five cases lodged against state court defendants arising from decoy team arrests only because each defendant passed a lie detector test. The District Attorney has and continues to press forward with prosecutions based solely upon arrests and testimony of Petitioners. Internal Affairs found no evidence of wrongdoing.

Sprague & Rubenstone thereupon began to expend hundreds of hours in connection with the representation of Petitioners, conducting investigations of the decoy team's arrests, interviewing witnesses, reviewing police records, appearing at state court proceedings, preparing briefs and motions, and advising its clients as to innumerable matters which arose during the course of the representation. Over the next few months, as the Petitioners and counsel continued to work together, Petitioners developed a greater feeling of confidence and trust in the firm of Sprague & Rubenstone and its lawyers, complementing the initial respect for the firm's abilities which had caused each Petitioner to initially decide to retain the firm as counsel.[3]

On September 10, 1981, four months after the firm was retained, Petitioners were charged with criminal violations of the federal civil rights statutes in a thirteen count indictment returned by a grand jury sitting in the Eastern District of Pennsylvania. The return of an indict-

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3. "THE COURT: Just tell me in your own words, because I want to understand why you are giving up this very important right.

MR. FLANAGAN: Sir, I can only explain it as a layman rather than as an attorney.

THE COURT: Yes. Just give it to me in your own words.

MR. FLANAGAN: All right, sir. I will explain it this way: Early-on when this situation first developed, and discussing the matter with my colleagues, we determined that we wanted the firm of Sprague & Rubenstone; Mr. Thall and Mr. Leonard are attorneys of the firm.

We spent quite a bit of time, personal time, attending to the matters relating to this particular situation, discussing particular, specific details regarding the allegations that these attorneys who are present here today are now presently aware of.

I can't speak in behalf of my colleagues, but personally I got—I have developed a large amount of confidence, I feel extremely comfortable with the way the matter has been handled up to the present time." (A68).

ment did not alter Petitioners' predetermined decision to proceed upon a common defense even were separate counsel ordered (A43-A44). Indeed, from the first date Petitioners appeared in the office of their counsel, each had been advised of potential conflicts of interest and the option of proceeding with separate counsel (A42-A45). From the inception of the attorney-client relationship, each Petitioner decided that, despite knowledge of available options and the possibility of judicial intervention in the retention of counsel of his choice, he wished to proceed with a common defense to be presented by the firm of Sprague & Rubenstone (A52, A55, A65-A66).

In response to the Respondent's Motion for a Hearing and to Prohibit Multiple Representation, only seeking to prevent Sprague & Rubenstone from representing more than one Petitioner, the district court held a hearing on November 12, 1981, pursuant to Fed. R. Crim. P. 44(c). At that hearing, each Petitioner repeatedly and unequivocally stated his desire to have a unified defense presented by Sprague & Rubenstone, his awareness of potential conflicts which could arise, and his willingness to waive such conflicts.

Following the lengthy Rule 44(c) hearing, at which each Petitioner was interrogated by the court and counsel for Respondent, the court found the following facts:

> "[I]t is quite apparent that there is no actual conflict today . . . It appears to me quite apparent that a conflict of interest is likely to arise in the course of these proceedings.
>
> "It is equally apparent that each of these defendants is fully and completely aware of the potential for conflict of interest, and that each, without financial pressure, has made the decision to waive any claim of conflict of interest, and is doing so intelligently and voluntarily, and to be represented by one counsel." (A45, A74).

Based upon these facts, the court below asked that certain issues be further briefed:

> "I am not satisfied at this moment that in light of my perception that the conflict of interest is very likely to arise in this case, that I can nevertheless accept the waiver of these defendants."
>
> • • •
>
> "If I do decide that separate counsel are required, does this require that present counsel be eliminated from the case altogether?" (A74, A76).

Briefs were simultaneously submitted by Petitioners and Respondent on November 19, 1981.

On December 2, 1981, the trial court entered an Order precluding Petitioners from retaining counsel of their choice by disqualifying the firm of Sprague & Rubenstone from representing any petitioner herein, A29. On December 3, 1981, Petitioners filed a Motion for Reconsideration and/or Clarification to assure that the basis for the court's Order was clear. On December 4, 1981, the court granted the Motion, clearly setting forth as the basis for its disqualification—"the presumption that privileged information has been acquired as a result of the attorney-client relationship." A30.

The court stayed its Order so that the correctness of its holding might be determined by the Third Circuit prior to conducting pretrial proceedings or holding trial on the merits, if necessary. A29, A40. On June 2, 1982, after briefing and argument, a panel of the Third Circuit issued a Judgment and Opinion affirming the trial court. A2, A32. Prior to the issuance of the mandate, the Petitioners filed a Petition for Rehearing and Rehearing En Banc, which Petition was denied by the Court on July 12, 1982. A34. The Court granted Petitioner's Application for a Stay of Issuance of Mandate, pending the filing of the within Petition for a Writ of Certiorari. A1.

REASONS FOR GRANTING THE WRIT

With this, the first case denying defendants in a criminal action their constitutionally protected right to counsel of their choice to present a common defense, it is time to confront directly and resolve the critical issue raised by the panel decision of the Third Circuit: will our Constitution permit the courts to preclude criminal defendants from presenting a common defense through retained counsel of their choice, given a knowing, voluntary and intelligent waiver of their Sixth Amendment rights, simply because the court perceives a potential conflict of interest lurking in the background, resulting from the sharing of information necessary to prepare the common defense. It is Petitioners' position that an interpretation of the Constitution precluding the presentation of a common defense through counsel of choice stands the Sixth Amendment's guarantees of effective assistance of counsel and the Fifth Amendment's guarantees of due process of law on their head, denying to Petitioners the lynchpin of their defense, despite a valid waiver.

A criminal defendant has a constitutionally protected right to be represented by retained counsel of his choice. Though as with all constitutional rights, this right is not absolute, it must necessarily have greater weight where retained counsel is chosen by defendants jointly charged in connection with the presentation of a common defense. A criminal defendant also has a constitutionally protected right to conflict-free counsel. Where these constitutionally protected rights may potentially clash, given the joint representation of criminal defendants seeking to present a common defense through counsel each has separately retained, it is the choice of each defendant to select which right should be vindicated, and not that of a court. Indeed, in the absence of an actual conflict of interest and given a valid waiver of any claim arising from potential conflicts of interest, a court should be powerless to preclude criminal defendants from having their common defense presented by retained counsel of their choosing.

The issues in this case, to quote from the panel opinion below, involve "[a] defendant's choice of counsel [which] is not to be dealt with lightly or arbitrarily". A10. Petitioners submit, however, that the panel opinion does indeed cast short shrift upon their choice of counsel, offending the pronouncements of this Court and directly conflicting with the opinions of all other circuits which have considered this issue.

The Panel Opinion Denying Petitioners the Counsel of Their Choice to Present Their Common Defense Due to Potential Conflicts of Interest, Despite a Valid Waiver of Such Conflicts, Is Inconsistent With the Decisions of This Court

The court below held that it had the power to disqualify counsel chosen and retained by Petitioners, finding that *potential* conflicts of interest existed which it deemed likely to arise at trial because of multiple representation. It is respectfully submitted that this holding is erroneous. Indeed, were it correct, an absolute ban on multiple representation of criminal defendants would be required since a potential for conflict is inherent in any such lawyer-client relationship, based upon the sharing of privileged information. In fact, a plain reading of the Supreme Court opinions in this area demonstrates that each Petitioner has a constitutional right to have a single law firm present a common defense. In order to comprehend the errors and misconceptions of the court below, it is necessary to trace the development of the law respecting the issues of multiple representation and conflicts of interest.

The holding that a potential conflict of interest warrants disqualification of counsel from multiple representation of co-defendants was the predicate for the Third Circuit's decision in *United States ex rel. Sullivan v.* Cuyler, 593 F. 2d 512 (3d Cir. 1979) (hereinafter "*Cuyler I*"). Two privately retained attorneys had represented both petitioner and two co-defendants in connection with state court murder trials. Sullivan raised no objection to

such representation, based, in part, on his inability to afford his own counsel. Sullivan was tried and convicted, after resting without presenting a defense. His co-defendants were later acquitted at separate trials.

After exhausting his state remedies, Sullivan filed a petition for habeas corpus arguing, *inter alia*, that counsel had a conflict of interest based upon their representation of his two co-defendants. The Third Circuit reversed the denial of the petition, finding that the mere possibility of conflict of interest resulting from multiple representation was sufficient to deprive a defendant of his right to effective assistance of counsel:

> "Numerous recent cases in this Circuit have repeated this standard and made clear that actual prejudice or conflict of interest need not be shown. The mere possibility, however, remote, is sufficient." *Cuyler I, supra,* 593 F. 2d 519-20.

On appeal, this Court specifically and unequivocally held that the standard enunciated by the Third Circuit in *Cuyler I* was erroneous. In *Cuyler v. Sullivan,* 100 S. Ct. 1708 (1980), (hereinafter *"Cuyler II"*), the Court held both that the Rule 44(c) inquiry is not constitutionally mandated,[4] and that multiple representation does not violate the Sixth Amendment absent an *actual* conflict of interest. *Accord: Holloway v. Arkansas,* 435 U. S. 475, 482 (1978). Respecting the latter point, *Cuyler II* held that a possibility of conflict from multiple representation is insufficient to warrant a conclusion that a lawyer's performance was adversely affected and/or ineffective:

> "We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to

4. "We conclude that the Sixth Amendment imposed upon the [state] trial court no affirmative duty to inquire into the propriety of multiple representation." *Cuyler II, supra,* at 1718. Although *Cuyler II* was decided prior to the effective date of Rule 44(c), the opinion referred both to the proposed rule and case law in reaching this holding. *Id.,* at 1716-1718.

demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler II, supra,* 100 S. Ct. at 1719. *Accord: Dukes v. Warden,* 406 U. S. 250 (1972).

Since, as *Cuyler II* holds, the presence of an actual conflict arising out of multiple representation and an adverse performance by counsel must occur before a claim of ineffective assistance may be colorably raised, it necessarily follows that no disqualification of counsel is warranted based upon a mere potential conflict of interest arising from multiple representation. Indeed, if the law were otherwise, the multiple representation of criminal defendants would be banned absolutely, as is noted in *Cuyler II* itself:

> "*Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. See 435 U. S. at 582. Since a possible conflict of interest inheres in almost every instance of multiple representation, . . . a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. Such a presumption would preclude multiple representation even in cases where '[a] common defense . . . gives strength against a common attack.' [*Holloway v. Arkansas,* 435 U. S. 475, 482-83 (1978)], quoting *Glasser v. United States,* 315 U. S. 60, 92 (1942) (Frankfurter, J., dissenting)." *Cuyler II, supra,* 100 S. Ct. at 1718.

No such absolute ban has ever been imposed or favorably viewed by this Court. Indeed, *Cuyler II* and *Holloway* suggest that the decision to have one firm represent codefendants and to present a common defense is itself constitutionally protected.

Since only an actual conflict of interest may permit a reversal of a conviction on Sixth Amendment grounds,

and since the Rule 44(c) inquiry is not even constitutionally mandated, *Cuyler II* strongly suggests, if not compels, that no court may deny a criminal defendant chosen counsel to present a common defense absent an actual conflict, especially where each defendant has made a valid waiver of conflict-free counsel. Indeed, every other Circuit which has considered this question has so decided.

Every Other Circuit Holds That Defendants' Choice of Counsel May Not be Undercut by the Court So Long as There Is a Valid Sixth Amendment Waiver, Even Absent a Common Defense

The panel opinion cited no circuit court authority supporting its holding. Indeed, it acknowledged that two other circuits had held to the contrary:

> "To the extent that the decision of two other circuit courts require district court acceptance of waivers in cases of potential or actual conflicts of interest, we respectfully disagree. *See, United States v. Armedo-Sarmiento,* 524 F. 2d 591 (2d Cir. 1975); *United States v. Garcia,* 517 F. 2d 272 (5th Cir. 1975)." A9.

Subsequent to the briefing below, other decisions have been issued, each of whose holdings are contrary to the panel opinion below so that the Third Circuit stands alone.

In *United States v. Curcio,* 680 F. 2d 881 (2d Cir. 1982), the court vacated an order precluding counsel from representing both or either defendant for want of an adequate opportunity to make a knowing and intelligent waiver of his right to conflict-free representation. In so holding, the court discussed the conflict issue, finding that it could be waived, relying on *Cuyler II*:

> "The principle that the right to separate representation may be waived finds its most recent support in the Supreme Court's decision in *Cuyler v. Sullivan,* 446 U. S. 335 (1980), in which the same pair of retained attorneys represented three defendants charged with

murder. The Court ruled that the mere fact of the multiple representation was not sufficient to establish a violation of Sixth Amendment rights, nor even to alert the state trial court that there might be need for an inquiry into potential conflicts of interest. The Court stated that '[a]bsent special circumstances, . . . trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.' *Id.* at 346-47 (footnote omitted). The Court construed its earlier decision in *Holloway v. Arkansas, supra,* as confirmation that multiple representation is not impermissible:

> *Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. See 435 U. S., at 482. Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel." *Curcio, supra,* 680 F. 2d at 886.

Holding that an attorney may represent more than one defendant in a criminal prosecution if the defendants so elect knowingly and wilfully, despite the potential conflicts lurking in the background, the court opined:

> Notwithstanding the considerable dangers, however, the teaching of the Supreme Court in *Glasser, Holloway,* and *Cuyler* is that defendants may, if they act with their eyes open, elect to be represented jointly by a single attorney. The recently adopted Fed. R. Crim. P. 44(c), . . . does not eliminate the defendant's power to waive his right to be represented by a conflict-free

attorney. While the rule imposes on the trial court the duty to make prompt inquiries and to advise the jointly represented defendants as to their rights to separate representation, it does not forbid joint representation. It merely requires that where a conflict may arise the court shall take such measures as may be appropriate to protect each defendant's right to counsel. Given the constitutional dimension of the defendant's right to counsel of his own choosing, if the defendant makes a knowing and intelligent election to pursue that right in preference to his right to an attorney of undivided loyalty, disqualification would not protect the Sixth Amendment right that the defendant asserts and would not be appropriate. *Curcio, supra,* 680 F. 2d at 887-88.

In *United States v. Cunningham,* 672 F. 2d 1064 (2d Cir. 1982), the court reversed the pretrial disqualification of defendants' counsel due to the rejection of a Sixth Amendment waiver, even though an actual conflict of interest was there presented. Observing that the right of a criminal defendant to be represented by retained counsel is "a right of constitutional dimension", and that such right ought "not be unnecessarily obstructed by the Court", *Id.* at 670, the court held that where the constitutional rights of the defendant to choice of retained counsel and conflict-free representation clash, he ought choose which takes precedence:

> "[I]f Cunningham's right to counsel of his choice conflicts with his right to an attorney of undivided loyalty, we think the choice as to which right is to take precedence should be left to Cunningham and not be dictated by the government." *Id., supra,* at 1079.[5]

5. *See, Curcio, supra,* 680 F. 2d at 885. "*Cunningham* thus established that where the former client does not seek disqualification and his rights can be adequately safeguarded, the interests of the former client, the interest of the public in the integrity of the judicial system, and the interests of the defendant are best protected by

In *Smith v. Bordenkircher*, 671 F. 2d 936 (6th Cir. 1982), the court held that a lawyer representing multiple criminal defendants need not withdraw as counsel for remaining defendants where one turned states' evidence, thus creating a potential conflict of interest, relying on *Cuyler II*:

> "In *Cuyler*, the Supreme Court noted that although a conflict of interest may be possible in every instance of multiple representation, a reviewing court cannot presume that the mere 'possibility for such conflict has resulted in ineffective assistance of counsel.' *Cuyler*, 100 S. Ct. at 1718. If a defendant does not raise the conflict issue at trial, then '[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.' *Id.* 100 S. Ct. at 1719. This two part test does not permit the formulation of strict rules against a lawyer's continued representation of remaining co-defendants if an indicted former client pleads guilty and cooperates with the prosecution. Rather, the *Cuyler* test directs us to determine, on the facts of each case, whether there is an actual conflict of interest and whether that conflict has caused ineffective performance in violation of the provisions of the Sixth Amendment. . . ." *Smith, supra*, 671 F. 2d at 987.

In *United States v. Agosto*, 675 F. 2d 965 (8th Cir. 1982), six defendants represented by three counsel, appealed from trial court disqualifications based upon conflict of interest claims, arising both from prior representations of interested persons and multiple representations of co-defendants. In this latter regard, the *Agosto* court held that the trial court abused its discretion by disqualify-

5. (Cont'd.)

honoring the defendant's knowing and intelligent decision to waive his right to an attorney of individual loyalty in order to retain the attorney of his choice."

ing counsel due to the possibility that co-defendants multiply represented could present inconsistent defenses, reasoning that a common defense rendered such concern moot:

> "In the criminal context, disqualification on the basis of the attorney's receipt of privileged information from a codefendant formerly represented by that attorney should only be considered upon a clear showing that the present and former clients' interests are adverse. Here, there has been no such showing. Gustafson, Norris and Agosto all contend that all of the defendants intend to present a joint defense, and that there, therefore, is no adversity of interests. While defendants Bruins and Newstrum are not on the record as joining in this contention, it appears that they were never asked to state their position. We find that the district court erred in rejecting appellants' assertion of intent to present a joint defense without conducting further inquiry into its validity. On remand, we direct that further inquiry take place." *Agosto, supra,* 675 F. 2d at 973.

Indeed, even were a common defense not advanced, and an actual conflict presented, the court nonetheless refused to disqualify counsel:

> "Assuming that after further inquiry the district court is satisfied that a clear showing has been made that the interests of defendants Bruins and Newstrum are adverse to the interest of Gustafson, we instruct the district court to consider whether there exists a means of eliminating the potential conflict less burdensome that [sic] disqualification. As we noted earlier, a client may consent to his former attorney's representation of adverse interests. Gustafson contends that Bruins and Newstrum have no objection to Walters' continued representation, and proposes employment of a backup attorney to cross-examine Bruins and Newstrum and do whatever else would be neces-

sary to alleviate the conflict should their interests ever prove adverse.[7] We note that Bruins and Newstrum never filed a motion for Walters' disqualification and never actively supported the government's motion. Under these circumstances, we hold that the district court should inquire of defendants Newstrum and Bruins as to their willingness to consent to Walters' continued representation of Gustafson, and use of backup counsel.[8] If Newstrum and Bruins are willing to consent, we see no reason to reject Gustafson's proposal to employ a backup counsel as a satisfactory resolution of the conflict. If they do not consent, however,[9] then we concur in the district court's exercise of discretion and disqualify attorney Walters.

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7. There is precedent for Gustafson's proposal. *See United States v. Jeffers*, 520 F. 2d 1256, 1266 (7th Cir. 1975), *cert. denied*, 423 U. S. 1066 (1976); *Tague, Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 Geo. L. J. 1075, 1115 (1979).

8. If Bruins and Newstrum do consent, they will in effect waive any future objections they may have to the fairness of their trial arising as a result of Walters' continued representation of Gustafson and employment of backup counsel. Thus, in order for the consent to be effective, we hold that it should fulfill all the standards of a knowing and intentional waiver of a constitutional right.

9. If the district court determines that the interests of the defendants are not adverse, it will only be because all defendants, including Bruins and Newstrum, represent that they intend to present a joint defense and that there are, therefore, no conflicts of interest. Under these circumstances, we consider it appropriate to require Bruins and Newstrum to execute an informed consent to Walters' continued representation of Gustafson, and use of backup counsel if necessary. In this way, the interest of the district court in insuring the integrity of the proceedings from post-conviction attack will be protected should the defendants prove wrong in their assessment of trial strategy. *Agosto, supra*, 675 F. 2d at 973-74."

Thus, the Second, Fifth, Sixth and Eighth Circuits each hold that a pretrial waiver of even an actual conflict of interest is binding and valid, in order to permit a defendant to proceed with counsel of his choice.[6] None of these cases, save *Agosto*, dealt with common defenses. Where trial strategy is bottomed on a common defense, by definition, there can be no conflicts of interest. *Agosto, supra*, 675 F. 2d at 975. Therefore, the impropriety of the panel opinion below is even more glaring.

Rule 44(c) Does Not Permit a Court to Undercut Petitioners' Constitutionally Protected Choice of Retained Counsel

The panel below held that despite a valid Sixth Amendment waiver and given the absence of any actual conflict of interests, nonetheless the court could disqualify counsel pursuant to Fed. R. Crim. P. 44(c):

> "It does not follow, however, that because defendants may waive the right to separate representation free from potential conflicts, they have an absolute right, constitutional or otherwise, to have such waiver accepted by a court. A truly knowing and intelligent waiver accepted by the court will isolate a conviction from later attack. But the perspective of a trial court judge need not be limited to a concern not to have a conviction overturned. . . ."
>
> "Where, however, the materialization of actual conflict is very likely, disqualification of defense counsel and ordering defendants to retain separate counsel are appropriate measures to be taken pursuant to Fed. R. Crim. P. 44(c)." A9, A10.

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6. Interestingly, the Third Circuit has so held as well, in *United States v. Laura*, 667 F. 2d 365, 371-73 (3d Cir. 1981). Thus, the panel below necessarily reasoned that a waiver, sufficient to preclude a post-conviction attack for actual prejudice shown, is somehow insufficient to support a pretrial constitutionally protected choice to have retained counsel present a common defense.

In so holding, the panel improperly construed a procedural rule to abrogate the constitutional rights possessed by petitioners.

As is set forth in *Cuyler II, supra,* the Rule 44(c) inquiry is *not* of constitutional dimension. Were it otherwise, then the state court in *Cuyler* would have been compelled, on Sixth Amendment grounds, to hold a Rule 44(c) hearing. Thus, Rule 44(c) merely requires that the court exercise its supervisory powers to personally advise defendants of their right to the effective assistance of counsel, including separate representation, where two or more defendants have been jointly charged and are represented by the same retained counsel. The Rule goes on to state:

> "Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

The Rule is silent respecting "appropriate measures" where there is good cause to believe a conflict of interest is likely to arise. Nonetheless, counsel is unaware of any other case which approves the appointment of separate counsel for joint defendants over the objection of co-defendants after waiver and absent an actual conflict, nor does the committee note,[7] or cases cited therein, so suggest.

Moreover, it necessarily follows that the Rule itself cannot be authority for the harsh sanction imposed by the Court below, since the Rule was not intended to affect substantive rights of constitutional dimension but was rather intended to secure uniformity and simplicity of criminal procedures and to protect a defendant's constitutional rights to choice of retained counsel and to fair and effective representation. In the Order of the Supreme Court adopting the Rules, Mr. Justice Frankfurter stated, "that

7. The note, of course, has no more weight than a legislative history of a statute, and cannot be used to expand or contract the clear intendment of the Rule. *United States v. Mihalopoulos,* 228 F. Supp. 994 (D. D. C. 1964).

the federal courts have power, or may be empowered, to make rules of procedure for the conduct of litigation has been settled for a century and quarter (*Wayman v. Southard,* 10 Wheat. 1, 6 L. Ed. 253)." Similarly, in *United States v. Debrow,* 346 U. S. 374 (1953), the court stated:

> "The Federal Rules of Criminal Procedure . . . were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure." *Id.* at 376.[8]

In *United States v. Schwartz,* 372 F. 2d 678 (4th Cir. 1967), the court echoed the *Debrow* theme, stating:

> "[The Rules of Criminal Procedure] are not constitutional requirements but are procedural merestones established . . . and effectuated by the Supreme Court in its supervision of criminal proceedings in the Federal Courts. (Citations omitted). Thus, we are dealing exclusively with a procedural question." *Id.* at 682.

Since the Rule does not and cannot expand the power of the trial court to order appointment of separate counsel, the "appropriate measures" which may be taken where there is good cause to believe a conflict likely to arise cannot include the disqualification of counsel here ordered.[9]

Indeed, Rule 44(c) cannot deprive Petitioners of their Sixth Amendment right to retain counsel of their choice. In *United States v. Armedo-Sarmiento,* 524 F. 2d 591 (2d

8. *Accord: United States v. Gray,* 448 F. 2d 164, 167 (9th Cir. 1971), "[The Rules of Criminal Procedure] were designed to simplify existing procedure and to make uniform certain practices in all district courts."

9. Petitioners submit that "appropriate measures" authorized by the Rule where a conflict of interest is found likely to arise include specific advice as to the nature, purpose, and scope of the right to separate counsel; the right to have counsel appointed if financial considerations are at issue; and the taking of a valid waiver in order to assure that a defendant's right to counsel of his choice is preserved.

Cir. 1975), the Second Circuit reversed an order disqualifying retained counsel on conflict grounds, stating:

> "[T]he district court did not give sufficient weight to the appellants' rights. Although the right to an attorney of one's choosing is not unlimited, the Sixth Amendment does give some protection to a criminal defendant's selection of retained counsel. *See United States v. Wisneiwski*, 478 F. 2d 274, 285 (2d Cir. 1973); *United States v. Sheiner*, 410 F. 2d 337, 342 (2d Cir.) *cert. denied*, 396 U. S. 825, (1969); *United States ex rel. Davis v. McCann*, 386 F. 2d 611, 618 (2d Cir. 1967), *cert. denied*, 390 U. S. 958 (1968). Cf. *Faretta v. California*, 422 U. S. 806 (1975), holding that there is a constitutional right to proceed pro se, and observing that the right to manage one's own defense is at the heart of the Sixth Amendment guarantees. . . . The client, however, may waive his Sixth Amendment rights to effective assistance of counsel . . . just as he may knowingly and intelligently waive any constitutional rights." *Id.* at 592.

In *United States v. Garcia*, 517 F. 2d 272 (5th Cir. 1975), city police officers charged with federal offenses including 18 U. S. C. §§ 241 and 242, obtained private counsel. Two officers retained one attorney; the remaining seven retained two attorneys who, in addition, represented fifteen other police officers who would likely testify at trial, many of whom had testified before the grand jury.

In reversing the trial court's order disqualifying the three lawyers from any representation of the nine defendants, the court assumed actual conflicts engendered from multiple representation, but held nonetheless that such conflicts could be waived:

> "We hold that if, as a matter of fact, a defendant after thorough consultation with the trial judge knowingly, intelligently and voluntarily wishes to waive [the right to conflict-free representation], the Constitution does not prevent him from so doing." *United*

States v. Garcia, supra, 517 F. 2d at 278. *Accord, United States v. Curcio; United States v. Cunningham, supra.*

Thus, all these cases have placed their imprimatur upon a defendant's right to waive an actual conflict engendered by multiple representation after an inquiry, patterned on Rule 44(c), establishing the constitutionally requisite predicates for such waiver. Therefore, it is clear that Rule 44(c) does not expand upon the powers of the trial court to disqualify counsel from multiple representation of co-defendants in a criminal action; rather, it merely sets forth procedures to be followed in order to assure that the waiver, as here, meets constitutional standards.

The Opinion Below Precludes the Presentation of a Common Defense

Both the panel and the district court articulated that the potential conflict causing them the most concern was that occasioned by counsel's acquisition of privileged information by dint of the lawyer/client relationship.

The major section of Petitioners' appellate brief discussed the facts that whether Petitioners are represented by one firm or separate firms:

> (a) any privileged information shared among counsel raises the self-same potential conflict; and
>
> (b) the price paid for sharing privileged information is the waiver of the attorney/client privilege respecting that information should the common defense break down.[10]

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10. This latter point was seemingly accepted by the panel which set forth in a footnote, "6. *See, e.g., In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974,* 406 F. Supp. 381 (S. D. N. Y. 1975) (attorney-client privilege will not apply among joint defendants and their attorneys in later controversies between or among those clients, even though shared information may initially be insulated from exposure beyond confines of the group)." A10. The former point was not discussed by the panel.

It necessarily follows, therefore, that the panel opinion serves to preclude the presentation of a common defense because such defense necessarily hinges upon the complete sharing of privileged communications made to counsel, regardless of the number of firms representing co-defendants. Thus, while couched in terms of multiple representation, the panel opinion actually precludes the presentation of a common defense, relying upon a procedural rule to abrogate the strategy constitutionally accepted by this Court. *See Glasser, supra, Holloway, supra.*

The Panel Opinion Undermines the Ability of Clients to Consult With and Retain Counsel of Their Choice

The panel opinion implies a questioning of the initial decision to present a common defense:

> "Once each defendant has consulted with his own counsel, a truly independent decision may then be made whether or not to continue with a common defense strategy. . . ." A10. Also see A43.

Since the record is clear that the decision to present a common defense was made by each Petitioner prior to meeting with counsel, and that after repeated meetings with counsel, both separate and joint, the decision to proceed with a common defense was reaffirmed by each Petitioner, any suggestion that the common defense decision was other than independently made by each Petitioner is both specious and inflammatory.

As set forth above, each Petitioner determined that he should present a common defense in order to gain strength against a common attack, such decisions being made four months prior to the institution of criminal proceedings. Each chose the firm of Sprague & Rubenstone as the vehicle through which his desires would be best implemented, based upon his knowledge of the firm's reputation and his confidence in its members. To whom would the panel have Petitioners go to discuss their case? It

would appear that each Petitioner would have to consult with a separate lawyer in whom he had less or no trust and confidence in order to obtain permission to have Sprague & Rubenstone present a common defense. Should second or third choice counsel advise that no common defense be presented, why should Petitioners accept such conclusion? Finally, who should pay for the cost to Petitioners of consulting with unchosen counsel for the receipt of advice they do not wish to obtain from that source?

Absent an actual conflict of interest, there is no constitutional value offsetting each Petitioner's constitutionally protected right to counsel of his choice. As such, the court's decision to disqualify counsel in this case constitutes a flagrant substitution by the panel of its judgment for that of the Petitioners. Since the panel cannot know and is not entitled to know the predicates upon which each Petitioner's judgment is based, such action by the panel is nothing more than a bald and unwarranted interference with each Petitioner's Sixth Amendment rights. In so acting, the panel, in fact, has affirmed the trial court's dictation to each Petitioner, over his objection, of what his best interests are and how they will best be served. Such a paternalistic posture is offensive, and, if permitted to stand, would turn the concept of supervisory powers on its head.

Moreover, since courts permit criminal defendants to waive myriad Fourth, Fifth and Sixth Amendment rights even absent consultation with any counsel, and, respecting the Fourth Amendment, without a requirement that such defendant be made aware of the extent of his rights, the panel decision seems peculiarly inappropriate as well as substantively incorrect.

Resolution of the Issues Posed Herein Will Substantially Diminish the Workload of all Federal Courts

The 1981 Term of the Supreme Court contained no less than fourteen cases raising post-conviction issues re-

sulting from multiple or joint representation.[11] One case posed the question whether a pretrial disqualification of counsel with an actual conflict of interest, absent a waiver or common defense, is a final, appealable order. *Greger v. United States*, No. 81-1357, *cert.* petition filed, 50 U. S. L. W. 3722 (January 19, 1982).

Obviously, the administrative burden on this Court imposed from consideration of post-trial multiple representation cases is considerable. A ruling on the merits of Petitioners' claim will have the salutory effect of reducing the docket of this Court and all other federal tribunals. If this Court holds that absent an actual conflict, pretrial waivers of conflict-free counsel are valid, then the sole question which may be subsequently raised is that respecting the sufficiency of the waiver. The concomitant reduction in dockets and complexity of issues posed in each docketed case will be considerable throughout the federal system.

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11. *Crossman v. United States*, No. 81-1825, *cert. denied*, 50 U. S. L. W. 3916, May 18, 1982; *McLister v. United States*, No. 81-1276, *cert. denied*, 50 U. S. L. W. 3695, March 1, 1982; *Snyder v. Ohio*, No. 80-2199, *cert. denied*, 50 U. S. L. W. 3246, October 5, 1981; *Myhrvold v. Sullivan*, No. 81-377, *cert. denied*, 50 U. S. L. W. 3351, November 2, 1981; *Monius v. United States*, No. 81-948, *cert. denied*, 50 U. S. L. W. 3487, December 14, 1981; *Monroe v. New York*, No. 81-1188, *cert. denied*, 50 U. S. L. W. 3669, February 22, 1981; *Hopper, Warden v. Johnson*, No. 81-60, *cert. denied*, 50 U. S. L. W. 3352, November 2, 1981; *Balkcom v. Baty*, No. 81-1587, *cert. denied*, 50 U. S. L. W. 3943, June 1, 1982; *Leader v. United States*, No. 81-1165, *cert. denied*, 50 U. S. L. W. 3591, January 25, 1982; *Broderick v. United States*, No. 81-1647, *cert. denied*, 50 U. S. L. W. 3838, April 19, 1982; *Horowitz v. Florida*, No. 81-254, *cert. denied*, 50 U. S. L. W. 3300, October 19, 1981; *Scully v. Camera*, No. 81-790, *cert. denied*, 50 U. S. L. W. 3487, December 14, 1981; *Duckworth v. Serrano*, No. 80-2041, *cert. granted*, judgment vacated and case remanded with per curiam opinion, 50 U. S. L. W. 3297, October 19, 1981; *Duckworth v. Cowell*, No. 81-1038, *cert. granted* and judgment vacated and case remanded, 50 U. S. L. W. 3715, March 8, 1982.

If, on the other hand, this Court holds that Petitioners may not present a common defense through unitary counsel, despite no actual conflict of interest and given a valid waiver, then no such issue will continue to clog the dockets of this Honorable Court and the other federal tribunals, for counsel will per force alter their manner of providing criminal representation in common defense cases.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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Appendix.

ORDER OF THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT ENTERED JULY 23, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3116

UNITED STATES OF AMERICA

v.

FLANAGAN, ROBERT
KEWESHAN, JAMES
LANDIS, SIDNEY
McNAMEE, THOMAS,

Appellants

(D. C. Crim. No. 81-00270-01/4)

It appearing that on July 19, 1982, appellants filed a motion for stay of mandate to and including September 19, 1982, and the Clerk's Office having issued the mandate on July 20, 1982, in error;

It is ORDERED that the mandate issued July 20, 1982, be, and is hereby recalled.

For the Court,

/s/ SALLY MRVOS
Sally Mrvos
Clerk

Dated: July 23, 1982

PANEL OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED JUNE 2, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3116

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS and THOMAS McNAMEE,
Appellants

(D.C. Criminal No. 81-00270-01/04)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: May 11, 1982

Before: GIBBONS and HUNTER, *Circuit Judges* and THOMPSON, *District Judge* *

(Opinion Filed: June 2, 1982)

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Opinion of the Court

GIBBONS, *Circuit Judge*:

This appeal presents questions concerning the power of a district court to disqualify joint counsel for criminal defendants under a recently enacted section of Rule 44, Federal Rules of Criminal Procedure. After finding that a conflict of interest was very likely to arise, that each defendant was aware of the potential conflicts, and that each defendant had voluntarily and intelligently chosen to

waive any claim of conflict of interest, the district court ruled that it need not accept the defendants' waiver and proceeded to disqualify the defendants' chosen counsel from the case entirely. We affirm.

I.

The defendants, Robert Flanagan, James Keweshan, Sidney Landis and Thomas McNamee, are all police officers employed by the Philadelphia Police Department as members of a so-called "grandpop" squad that serves to decoy and apprehend street criminals. They each have been charged in a single indictment with conspiracy to violate the civil rights of citizens, 18 U.S.C. § 241, and also have been charged in various other counts of the same indictment with substantive violations of those rights. 18 U.S.C. §§ 2, 242. The government charges that the defendants conspired to arrest persons, under color of law, without probable cause, and that various groups of the defendants falsely arrested and physically abused eight persons in violation of their civil rights.

The defendants chose to present a common defense, and all retained the law firm of Sprague & Rubenstone (the firm) to represent them. Pursuant to a government request and in accordance with Fed. R. Crim. P. 44(c), the district court conducted a hearing to determine whether defendants were aware of the risks of joint representation and of their rights to separate representation. The court found that each defendant had already been apprised by an attorney from the firm of a number of potential risks associated with joint representation. The court then questioned each defendant, under oath, to ascertain whether he understood those risks, and whether financial considerations had played a role in the choice of counsel.

The court found that each defendant was completely aware of the potential conflicts of joint representation and that each defendant had voluntarily and intelligently chosen to waive any claim of conflict of interest in electing to be represented by one counsel. But because the court

also found that a conflict of interest was very likely to arise in the course of the proceedings, it held that the waivers need not be accepted, and ordered that the firm should be disqualified from representing any of the defendants. Defendants appealed [1] and the district court has granted a stay of its proceedings pending disposition of the appeal.

II.

A new section of Rule 44, Federal Rules of Criminal Procedure, concerning Right to and Assignment of Counsel, became effective on December 1, 1980:

> *Joint representation.* Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Fed. R. Crim. P. 44(c). The district court's disqualification order was made pursuant to the final sentence of this rule. Thus in order to reverse we would have to find either that there is good cause to believe that no conflict

1. We have jurisdiction to hear appeals from district court orders disqualifying counsel under 28 U.S.C. § 1291 inasmuch as such orders are "collateral orders" within the meaning of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). *E.g.*, United States v. Miller, 624 F.2d 1198, 1199 (3d Cir. 1980); IBM v. Levin, 579 F.2d 271, 277-78 (3d Cir. 1978). Those holdings are not affected by Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 372 n.8 (1981).

of interest is likely to arise, or that the measures taken were an abuse of discretion.

A.

Although the defendants do not dispute the existence of potential conflicts of interest in joint representation by the firm, it is nevertheless important to review the nature of these potential conflicts in order to determine whether the court's action was appropriate under the circumstances.

Each defendant is not charged in every count of the indictment. Two are charged in all counts, while in five of thirteen counts only three are charged. This varying amount of involvement was a basis for defendants' motion to dismiss the first count (conspiracy) of the indictment. Defendants Landis, McNamee and Keweshan also moved for sentence, contending that their role was only to respond to a signal from Flanagan (the decoy) and that prejudice would arise if they were forced to stand trial with him. Lastly, as the district court points out and as the defendants have recognized, oral statements made by the defendants in the course of their decoy employment are essential to prove the requisite state of mind of each defendant. Defense counsel would ordinarily want to cross-examine any hearsay witness as to a specific defendant. Yet a joint counsel, privy to confidences of another defendant that might at the same time tend to implicate the latter while absolving the former, would find himself in an awkward situation.

All these factors indicate conflicts that joint defense counsel will very likely face in presenting an adequate defense for each defendant. Some, such as inability to argue the innocence or lesser culpability of one defendant based upon the guilt or greater culpability of the other, are inherent in the situation. Some may arise due to future events. For example, the government may offer immunity to one defendant in return for testimony against the others. In one sense these problems may not yet have arisen and thus the conflicts of interest may be

deemed merely potential. Indeed, it is conceivable that it will never be in one of the defendants' interest to adopt a strategy that would have adverse consequences for another defendant. A common defense throughout the proceedings might truly offer each the best opportunity for acquital. On the other hand, the present likelihood of a future actual conflict of interest, which could result in the inadequate representation of some defendants, must be considered by defendants' counsel [2] and by the court,[3] and brought to the defendants' attention.

B.

In this instance, both the joint counsel and the district court carefully brought various likely conflicts to the attention of the defendants. The court found that the defendants have voluntarily and intelligently waived any claim of conflict of interest and have elected to be represented by the firm.[4] The defendants now contend that this

2. *See ABA Standards Relating to the Prosecution Function and the Defense Function* § 3.5(b) (1971) at 211:

> The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

See also Code of Professional Responsibility, DR 5-105 (Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer).

3. *See* Fed. R. Crim. P. 44(c), supra.

4. The government suggests that under the circumstances of this case, defendants could not have made knowing and intelligent waivers of their rights to conflict-free representation. *See* United States v. Quinones, 613 F.2d 47 (3d Cir.), *cert. denied*, 446 U.S. 937 (1980); United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978); United States v. Helton, 471 F. Supp. 397 (S.D.N.Y. 1979). It also suggests that the waivers by defendants were merely conditional.

waiver entitles them to such joint representation and that the district court may not interfere with their choice.

The sixth amendment guarantee of effective assistance of counsel does not provide defendants with an absolute right to the lawyer of their choice. *Davis v. Stamler,* 650 F.2d 477 (3d Cir. 1981); *United States v. Dolan,* 570 F.2d 1177 (3d Cir. 1978). Although the sixth amendment and the due process clause of the fifth amendment do afford some protection for a defendant's decision to select a particular attorney, that protection goes no further than preventing arbitrary dismissal of the chosen attorney, and providing a fair opportunity to secure counsel of his choice. *Davis v. Stamler, supra.* Defendants urge, nevertheless, that the district court must accept their valid waiver of conflict-free representation, at least in instances where the conflicts are merely potential and not present.

Much of the legal precedent dealing with the right to conflict-free representation and with the waiver of that right has been announced in cases reviewing prior convictions. In *United States ex rel. Hart v. Davenport,* 478 F.2d 203 (3d Cir. 1973), for example, this court recognized that the right to assistance of counsel unimpaired by conflicts arising from joint representation, may be waived, but held the prior trial to have been constitutionally defective where the record was silent as to any such waiver. In *Cuyler v. Sullivan,* 446 U.S. 335 (1980), the Supreme Court reversed this court's holding with respect to one aspect of such post-conviction challenges. The Court held that in order to establish a sixth amendment violation, a defendant who raised no objection at trial must demonstrate that an actual—not merely potential—conflict of interest adversely affected his lawyer's performance. 446 U.S. at 348. In the course of its discus-

4. (Cont'd.)

U.S. Brief at 18-23. We see no reason, however, to doubt the district court's characterization of the waivers. In view of our disposition of this case, in any event, there is no reason to question that characterization.

sion, when commenting that multiple representation may be valuable in presenting a common defense against a common attack, the Court acknowledged that waiver of potential conflicts is possible. *Id. See also Holloway v. Arkansas,* 435 U.S. 475, 482-83 (1978); *Glasser v. United States,* 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting). After *Cuyler v. Sullivan,* this court refused to set aside a conviction and to allow withdrawal of a guilty plea when the defendant had knowingly and intelligently waived her right to separate counsel. *United States v. Laura,* 667 F.2d 365, 371-73 (3d Cir. 1981).

It does not follow, however, that because defendants may waive the right to separate representation free from potential conflicts, they have an absolute right, constitutional or otherwise, to have such waivers accepted by a court. A truly knowing and intelligent waiver accepted by the court will insulate a conviction from later attack. But the perspective of a trial court judge need not be limited to a concern not to have a conviction overturned.[5]

In *United States v. Dolan,* 570 F.2d 1177 (3d Cir. 1978), this court held that a trial court need not accede to a waiver of conflict of interest when faced with an actual serious conflict of interest on the part of an at-

5. *See generally* Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney,* 62 Minn. L. Rev. 119 (1978). To the extent that the decisions of two other circuit courts require district court acceptance of waivers in cases of potential or actual conflicts of interest, we respectfully disagree. *See* United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975). The independent constitutional right to represent oneself in a criminal trial recognized in *Faretta v. California,* 422 U.S. 806 (1975), does not imply a constitutional right to waive conflict-free representation by counsel. A defendant's decision to proceed with joint counsel in the face of possible conflicts implicates more considerations and affects more people than does a decision to proceed *pro se. See Geer, supra,* at 158-59.

torney representing two co-defendants. In addition to the trial judge's interest in being free from post-conviction attacks, we mentioned the court's concerns about breaches of professional ethics and about respect for the integrity of the court. *Id.* at 1184.

In *Dolan,* we stressed that the trial court was faced with "an actual serious conflict of interest, rather than a mere possibility, . . ." *Id.* That, however, should not be taken to mean that the trial court must accede to a waiver when the conflict is anything short of actual. In this case the trial court found, and the defendants do not dispute, that a conflict of interest is very likely to arise. The trial court expressed its concern for the professional ethical standards to which defense counsel should be held, and questioned whether in this case the firm was even in a position to advise the defendants fully of the possible conflicts in view of the stated ignorance of government strategy regarding individual defendants. Finally, the trial court expressed its concern that the likely conflicts might well develop into actual conflicts before the trial came to a close, conceivably resulting in defendants' motions for a mistrial.

A defendant's choice of counsel is not to be dealt with lightly or arbitrarily. That choice should not be interfered with in cases where potential conflicts of interest are highly speculative. Where, however, the materialization of actual conflict is very likely, disqualification of defense counsel and ordering defendants to retain separate counsel are appropriate measures to be taken pursuant to Fed. R. Crim. P. 44(c). Once each defendant has consulted with his own counsel, a truly independent decision may then be made whether or not to continue with a common defense strategy in light of the hazards that such a strategy may entail.[6]

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6. *See, e.g., In re* Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381 (S.D.N.Y. 1975) (attorney-client privilege will not apply among joint defendants and their attorneys in later controversies between or among those clients, even

Appellants contend that even if joint representation were inappropriate, the firm should not have been disqualified from representing any of the defendants. The potential for conflict arising from the firm's receipt of confidential information from all the defendants, and its obligations in defending just one of the defendants, perhaps at the expense of the others, is obvious. While complete disqualification may not be required in every case where a potential conflict of interest is likely to arise, it is one of the measures committed to the district court's discretion by Rule 44(c). There was no abuse of discretion in this instance.

III.

The order of the district court disqualifying the firm of Sprague & Rubenstone from representing any of the four defendants and requiring that each defendant be separately represented will be affirmed.

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6. (Cont'd.)

though shared information may initially be insulated from exposure beyond confines of group).

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 2, 1981

United States District Court,
E. D. Pennsylvania.

Crim. No. 81-270.

UNITED STATES of America

v.

Robert FLANAGAN, James Keweshan,
Sidney Landis, Thomas McNamee.

Dec. 2, 1981.

Luther E. Weaver, Asst. U. S. Atty., Philadelphia, Pa., for plaintiff.

Richard A. Sprague, Bruce L. Thall, Philadelphia, Pa., for defendants.

Opinion

LUONGO, *District Judge.*

Presently before me is the Government's motion to prohibit the law firm of Sprague and Rubenstone from representing all four defendants in this criminal case. The defendants, Robert Flanagan, James Keweshan, Sidney Landis and Thomas McNamee, all police officers employed by the Philadelphia Police Department, are each charged in a single indictment with conspiracy to violate the civil rights of citizens. 18 U.S.C. § 241. The indictment also charges substantive violations of citizens' civil rights, *see* 18 U.S.C. § 242, by Flanagan (Counts Two through Thirteen), McNamee (Counts Two through Thirteen), Landis

(Counts Four through Thirteen), and Keweshan (Counts Two through Seven, and Eleven through Thirteen).

The defendants are members of a so-called "grandpop" squad, a decoy squad engaged in undercover operations to ferret out street crime. Typically, defendant Flanagan would pose as the decoy, with defendants Keweshan, Landis and McNamee as his backup. After being accosted and robbed by an assailant, Flanagan would signal the backup team by yelling: "Give me back my money." Keweshan, Landis and McNamee would then close in and make the arrest. The Government charges that over a period of about 17 months the defendants conspired to violate citizens' civil rights by arresting persons, under color of law, without probable cause, and that varying combinations of the defendants did in fact falsely arrest and/or physically abuse eight persons in violation of their civil rights.

Pursuant to the Government's request, and in accordance with Fed.R.Crim.P. 44(c),[1] a hearing was held on November 12, 1981, to inquire whether defendants were aware of (1) the risk of joint representation, and (2) their right to separate representation. Each of the defendants was present at the hearing. Bruce Thall and James Leonard from the firm of Sprague and Rubenstone ap-

1. Fed.R.Crim.P. 44(c), which became effective December 1, 1980, provides:

> (c) *Joint Representation.* Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

peared on behalf of the defendants. At that time, Mr. Thall informed the court that, after extensive discussions with each defendant concerning the risks and pitfalls of joint representation, each still wished to be represented by the firm of Sprague and Rubenstone.

Among the areas which Mr. Thall stated had been discussed with each defendant were the following:

(1) Opening and closing statements—Unlike separate counsel, joint counsel would not be able to set one defendant apart from another.

(2) Sentencing—In the event that more than one defendant were convicted, joint counsel could not argue that one defendant was more or less culpable than another.

(3) Spillovers—Possibility that jury might infer from joint representation that if one defendant is found guilty, the others must be also.

(4) Possible grants of immunity—Each defendant was told that the Government could offer one of the defendants immunity on the condition that he testify against the others, thus interfering with a joint trial strategy.

(5) Nature of the evidence—It was explained to each defendant that the Government might introduce more evidence tending to implicate defendant Flanagan, and that as a result:

(a) the jury might infer that the others were also guilty because of joint representation,

(b) defense efforts might be more concentrated toward the defense of Flanagan.

(6) Right to testify—If one defendant exercised his right to testify on his own behalf and one or more of the others did not, the jury, from the fact of joint representation alone, might infer guilt on the part of

those not testifying. Also, on cross-examination, the defendant who exercised his right to testify could be questioned as to his knowledge of activities involving the other defendants.

(7) Character and reputation testimony—Each was informed that if the defense offered character or reputation testimony on behalf of some but not all defendants, the jury might infer from the fact of joint representation that the character or reputation of the other defendants is undesirable.

(8) Right to separate counsel—Each defendant was apprised of his right to separate counsel, and that, if he could not afford counsel, the court would appoint counsel for him.

After Mr. Thall completed his outline of the areas discussed with the defendants, I questioned each defendant, individually and under oath, to ensure that each was aware of the potential conflicts that very likely could arise in this case. In addition to questioning the defendants on matters which had been explored by counsel, I also ascertained that each defendant understood that separate counsel could present a united defense strategy but, unlike joint counsel, could present alternative defenses as well. More importantly, I assured myself that financial considerations played no part in defendants' choice of joint counsel. Defendants advised me that their legal expenses were being paid by their union, the Fraternal Order of Police. Further, I advised each defendant that, if I ordered separate counsel and the union refused to defray the cost of such counsel, I would appoint counsel for them. Finally, in the presence of the court and defense counsel only, each defendant was given the opportunity to explain in his own words why, in light of the several risks created by joint representation, he wished to be represented jointly with the other defendants.

At the conclusion of the hearing, I found that (1) a conflict of interest was very likely to arise in the course of the proceedings against defendants; (2) each defendant was fully and completely aware of the potential conflicts; and (3) each defendant, without financial pressure, had voluntarily and intelligently chosen to waive any claim of conflict of interest and elected to be represented by one counsel. Defense counsel and the Government were then instructed to brief the question of whether I must accept the defendants' waiver, notwithstanding the conflict of interest that I find is very likely to arise. In addition, I asked the parties to address the question of whether I must disqualify the firm of Sprague and Rubenstone from the case entirely, in the event that I order that each defendant be separately represented.

Both sides have now filed memoranda of law. Since defense counsel concedes[1(a)] that "logic mandates" that the firm of Sprague and Rubenstone must be disqualified should separate counsel be ordered, the sole question before me is whether I may, and should, reject the defendants' voluntary, knowing and intelligent waiver of their right to separate counsel, given the conflict which is very likely to arise.

To find that a conflict is likely to arise in this case, one need not look beyond the indictment and the numerous pretrial motions, together with supporting memoranda of law, filed by defense counsel. It is immediately apparent from reading the indictment that all four defendants are not charged in each count, reflecting the fact that each defendant's involvement may vary significantly from that of

1(a). I do not rely on defense counsel's apparent concession. Whether or not defendants concede it, based upon the presumption that privileged information has been acquired as a result of the attorney-client relationship, *see United States v. Provenzano*, 620 F.2d 985 (3d Cir.), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980), logic does in fact mandate that, if separate counsel are ordered, Sprague and Rubenstone must be disqualified from representing even a single defendant.

the others. Indeed, the basis of defendants' motion to dismiss Count One of the indictment focuses almost entirely on the differences in each defendant's role in the allegedly false arrests:

> The indictment, then, charges that since arrests occurring on five days within the 17 month period (September 27, 1979; December 18, 1979; May 19, 1980; November 3, 1980; and January 6, 1981) were made without probable cause, therefore *each* of the movants necessarily conspired with each other to "arrest various citizens without probable cause" [Indictment, Count One, Paragraph 2] throughout the length and breadth of the 17 month period. In addition, only two movants, Flanagan and McNamee, participated in each of the five arrests. As is reflected in the "Indictment Breakdown", Landis was not involved in the arrest or other proceedings involving Walker and Howard, so that the indictment contains no hint that Landis could have been part of the conspiracy alleged, at least until the arrests of Woodrit and Young, on December 18, 1979.
>
> Similarly, movant Keweshan is not alleged to have acted in any capacity, or even been present at, the arrests of Ford and Tooles on May 19, 1980. Indeed, the only arrests in which each movant is alleged to have participated, are those of Woodrit and Young, Adams, and Bibbs.

Defendants' Memorandum of Law in Support of Motion to Dismiss Count One of the Indictment (Document 12, at p. 3).

And again,

> Indeed, the different identity of the alleged co-conspirators present during each "illegal" arrest, coupled with the disparate times within which the conspiracy is alleged to have existed, and the fact that, despite performing the same activity throughout the

> totality of the period ostensibly covered by the conspiracy, on no other dates with no other arrests are such acts deemed to be "illegal", suggests not only that each "illegal arrest" was the product of a separate and distinct agreement, but also that each movant, on the other dates within the period while working as a police officer, necessarily "withdrew" from any agreement to violate any law.

Id. at 13. The likelihood that one or more defendants might, at some point, wish to distinguish his or their particular role from the others is hardly remote. Furthermore, defense counsel has observed correctly that this is a complex case which will most likely turn on circumstantial evidence which is "subject to various interpretations and fine distinctions." Defendants' Memorandum of Law in Support of Defendants' Motion for Discovery and Inspection (Document 10) at p. 3. Implicit within this complexity is the fact that essential to the Government's case is proof of each defendant's state of mind. The defendants expressly recognize that oral statements made by the defendants are essential to prove the requisite state of mind of each defendant. *Id.* at 3-4. The potential for conflict here is overwhelming since joint counsel's obligation to preserve the confidences of one defendant could severely hamper the cross-examination of any hearsay witness as to another defendant. Since a defendant's "guilt or innocence may turn on exactly what was said," *id.* at 4, I cannot lightly overlook this possibility of conflict.

The most glaring evidence of the potential for conflict which may arise if all defendants are represented jointly is found in defendants Keweshan, Landis and McNamee's motion for severance, and the accompanying memorandum of law (Document 13). Although paragraphs 2-5 of the motion are set forth in the footnote,[2]

2. In pertinent part, defendants Keweshan, Landis and McNamee's motion for severance states:

briefly stated, defense counsel contends in the motion for severance that defendants Keweshan, Landis and McNamee will be severely prejudiced if forced to stand trial with defendant Flanagan because it was Flanagan's information which provided the probable cause for each

2. (Cont'd.)

(2) Defendants Keweshan, Landis and McNamee, in the performance of this duty would remain hidden while co-Defendant Robert Flanagan, posing as an aged derelict, was confronted and robbed of his money by numerous individuals. Only after the criminals had taken his money and co-Defendant Robert Flanagan gave a standard alarm, "Give me back my money," did the backup officer come on the scene.

(3) Defendants Keweshan, Landis, and McNamee aver that the present indictment, stripped to the core, discloses that all alleged violations of 18 U.S.C. §§ 241, 242 and 2 are by necessity based upon one of several arrests in which certain of them, in the performance of their duty, and only in response to their team leaders signal, acted to take a suspect into custody, reported their knowledge of this act to their superiors, and, in response to Subpoenas, gave testimony as to their participation in these arrests in various courts of law.

(4) Defendants Keweshan, Landis, and McNamee aver that (a) since their participation in each arrest underlying this Indictment was predicated on their receipt of a prearranged signal from co-Defendant Flanagan; (b) further, that from their places of hiding, they were not privileged to the details of what, in fact, occurred between co-Defendant Flanagan and the various persons who robbed him; and (c) each of the overt acts and acts included in substantive counts, related to certain of them in their individual capacity, is, standing alone, a legal act, and, in fact, was required either by circumstance or law.

(5) Defendants Keeweshan, Landis and McNamee aver that in consideration of all the foregoing reasons, the Government's case, by necessity, will be dependent on facts and circumstances of which they have little or no knowledge, but, rather, the vast majority of the Government's evidence will be related to what transpired between co-Defendant Flanagan and the various individuals who robbed him.

arrest. Specifically, counsel contends that prejudice will arise because the vast majority of the Government's evidence will be adduced against Flanagan. Hence, defense counsel argues in the memorandum of law in support of the motion for severance: "The circumstances underlying the present Indictment are such that Defendants Keweshan, Landis and McNamee strongly urge upon this Court that 'the moment' when prejudice is likely to occur if they are forced to trial along with co-Defendant Flanagan is now." Defendants' Memorandum of Law in Support of Defendants' Keweshan, Landis and McNamee's Motion for Severance (Document 13) at p. 2. Because I too am gravely concerned by the prejudice which might redound to the other defendants by virtue of their association with Flanagan and, more particularly, by joint counsel's possible inability to distance Keweshan, Landis and McNamee from Flanagan, I must address the question of whether I may order separate counsel over defendants' voluntary, knowing and intelligent waiver of their right to separate counsel.

Fed.R.Crim.P. 44(c) provides that, "[u]nless it appears that there is good cause to believe no conflict is *likely to arise*, the court shall take such measures as may be appropriate to protect each defendant's right to counsel." Fed.R.Crim.P. 44(c) (emphasis added). The phrase "such measures as may be appropriate to protect each defendant's right to counsel" is nowhere defined in the rule. Furthermore, since the rule did not become effective until December 1, 1980, there is no case law, as yet, interpreting the rule. Nevertheless, defendants argue that, based on pre-rule 44(c) precedents in this and other circuit courts of appeals, this court has no power to reject a criminal defendant's voluntary, knowing and intelligent waiver of separate counsel unless an *actual* conflict of interest is shown to exist. The Government argues to the contrary, contending that, pursuant to my obligation to supervise the conduct of members of the bar, I do have

authority to reject the defendants' waiver and order that each be represented by separate counsel.

As with so many difficult legal questions, resolution of the issue before me requires a balancing of two substantial but competing interests. First, while it is often said that a criminal defendant does not have an absolute Sixth Amendment right to particular counsel, *United States ex rel. Carey v. Rundle*, 409 F.2d 1210 (3d Cir. 1969), *cert. denied*, 397 U.S. 946, 90 S.Ct. 964, 25 L.Ed.2d 127 (1970), that statement should not be construed to mean that a defendant has no constitutional right to counsel of his choice. The Third Circuit Court of Appeals has frequently stated that, within limits, a criminal defendant is entitled to be represented by particular counsel. *E.g.*, *Davis v. Stamler*, 650 F.2d 477 (3d Cir. 1981); *United States v. Laura*, 607 F.2d 52 (3d Cir. 1979); *United States ex rel. Carey v. Rundle*, *supra*. However, against a defendant's Sixth Amendment right to counsel of his choice must be weighed this court's responsibility to supervise the professional conduct of attorneys practicing before it. *See, e.g., United States v. Miller*, 624 F.2d 1198 (3d Cir. 1980). In *Miller*, the district court disqualified the law firm representing Miller because a member of the law firm had been an assistant U. S. Attorney at the time the case against *Miller* was prepared. Even though the former government attorney had no direct involvement with the preparation of the case against Miller, the Court of Appeals upheld the district court's order disqualifying the attorney in order to avoid the appearance of impropriety which might result if former prosecutors were permitted to "assume private employment that appears to involve conflicts of interest." *Id.* at 1202-03. Similarly, in *United States v. Provenzano*, 620 F.2d 985 (3d Cir.), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980), the district court disqualified a defendant's attorney because the attorney had previously represented the government's chief witness, Ralph Picardo, on a murder conviction.

Although the defendant was willing to waive the conflict, the Court of Appeals upheld the district court's order because the attorney's duty to preserve the confidences of Picardo could interfere with the effectiveness of the attorney's cross-examination of Picardo on behalf of his client. Interestingly, the Court of Appeals accepted the district court's assumption (since no explicit findings were made) that the attorney possessed privileged information which involved him in a conflict. *See id.* at 1004-05.

Although the ethical considerations which justified disqualifying the criminal defendant's attorney in *Miller* and *Provenzano* did not stem from any multiple representation of defendants, the two decisions reflect clearly the Third Circuit Court of Appeals' heightened sensitivity toward ethical concerns and the district court's responsibility for enforcing the rules of ethics. This sensitivity is further reflected in *United States v. Quinones*, 613 F.2d 47 (3d Cir.), *cert. denied*, 446 U.S. 937, 100 S.Ct. 2155, 64 L.Ed.2d 790 (1980), which, unlike *Miller* and *Provenzano*, did involve multiple representation of defendants. In *Quinones*, the district court found that a potential for conflict of interest existed and that the defendants had not made a knowing and intelligent waiver of their right to effective representation. The district court ruled, however, that the defendants could not be represented by the same counsel, and the Court of Appeals affirmed the ruling as not clearly erroneous. On only one occasion has the Court of Appeals for the Third Circuit reversed a district court for disqualifying counsel of a criminal defendant's choice, *see United States v. Laura, supra*, and then only because the district court failed to give any reasons on the record for so doing.

Defendants argue that *Miller*, *Provenzano* and *Quinones* are all inapposite to the issue presented by the Government's motion to prohibit multiple representation. Rather, defendants maintain that the Third Circuit Court

of Appeals' decision in *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978), is controlling. In *Dolan*, two defendants, Michael Garofolo and John Dolan, were represented jointly by Samuel DeLuca. The day before the trial was scheduled to begin, DeLuca, without Garofolo's knowledge, offered to have Garofolo plead guilty if the Government would agree to dismiss the charges against Dolan. Although the Government refused, Garofolo pled guilty on the date set for trial. After questioning Dolan and Garofolo about the dangers of multiple representation, the district court judge accepted Garofolo's guilty plea. With sentencing of Garofolo postponed, the trial against Dolan then went forward. Dolan took the stand in his defense and attempted to shift the guilt to Garofolo. Subsequently, the Government informed the court that Garofolo had been subpoenaed to testify as a rebuttal witness. At this juncture, the judge questioned DeLuca as to how he could represent Garofolo, who was awaiting sentencing, and effectively cross-examine Garofolo on behalf of Dolan. Although DeLuca stated that he perceived no conflict of interest, the district court ordered DeLuca to withdraw from representing either Garofolo or Dolan. On appeal, Dolan's attorney argued that Dolan had the right to waive his right to the effective assistance of counsel and to proceed with DeLuca as his attorney in spite of the conflict of interest. The Court of Appeals found that the district court had properly exercised its supervisory authority in disqualifying DeLuca and affirmed, stating:

> Faced with an actual serious conflict of interest, rather than a mere possibility, in which it is obvious that Mr. DeLuca cannot "adequately represent the interest" of his client, Dolan, must the court accede to Dolan's waiver of conflict of interest? We think not. In the current effort to elevate the standards of the organized bar, the ABA Code of Professional Responsibility provides that "a lawyer may represent multiple clients [only] if it is obvious that he can adequately

represent the interest of each . . . ." ABA Code of Professional Responsibility (1975) DR5-105(C). Accordingly, we hold that when a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver. Under such circumstances, the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation. See Note, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 Crim.L.&C. 226, 250 (1977).

570 F.2d at 1184 (notes omitted).

Defendants read *Dolan* as holding that only where an *actual* conflict of interest is found may a district court disregard a defendant's knowing and intelligent waiver of his right to effective representation. Thus, since no actual conflict of interest has been shown to exist in this case thus far, defendants contend that their Sixth Amendment right to counsel of their own choosing must be respected. Defendants' position appears to be in accord with decisions from the Second and Fifth Circuit Courts of Appeals which indicate that a criminal defendant may knowingly and intelligently waive his right to conflict-free representation, and that the district court's supervisory authority must give way to the defendant's Sixth Amendment right to particular counsel. *See United States v.*

Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975).

Unlike defendants, I do not read *Dolan* as holding that *potential* conflict is *never* sufficient to override a defendant's knowing and intelligent waiver of his right to effective representation. Indeed, that issue was not before the court. In *Dolan*, the conflict manifested itself *after* the trial had commenced. Here, I must determine whether a district court may take the initiative and exercise its discretion to avoid the serious potential for conflict before jeopardy attaches. Since I conclude that I may, and, more importantly, because of my grave concern that a conflict is very likely to arise in this case, I will grant the Government's motion and disqualify the firm of Sprague and Rubenstone from representing any of the defendants in this case.

In reaching my determination, I am influenced by several factors. First, Rule 44(c), which became effective more than two years after *Dolan* was decided, looks prospectively. Obviously, in advance of trial, the district court judge has very little opportunity to discern whether an actual conflict of interest exists as a result of multiple representation. To overcome this difficulty, some courts have resorted to what to me appears to be the fiction of finding that the attempted waiver is not knowingly and intelligently made. I simply refuse to adopt that approach where, after a thorough examination of defendants, four career police officers continue to desire to be represented by single counsel. Second, the concerns underlying the *Dolan* decision appear to be as pressing in this case. In *Dolan*, the Court of Appeals expressed concern not only over the breach of professional ethics arising from the joint representation, but also over the interest of the trial judge in being "free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court." 570 F.2d at 1184.

Although not easily applied, defense counsel's ethical responsibility to the defendants in this case is contained

in *ABA Standards Relating to the Defense Function* § 3.5 (Approved Draft 1971) which, in relevant part, provides:

> The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is *clear that no conflict is likely to develop* and when the several defendants give an informed consent to such multiple representation. (Emphasis supplied)

See also ABA Code of Professional Responsibility DR5-105. Based upon defense counsel's submissions to the court, I have no doubt that this is not a case where "no conflict is likely to develop." Indeed, I am not sure whether defense counsel is even in a position to discuss the possibilities of conflict with the defendants:

> A summary reading of the Indictment will convince the Court that not only are the Defendants unable to determine what particulars the Government intends to prove against them as a group, but perhaps more importantly, the Defendants as individuals are unable to make a reasoned determination whether there is a defense available to one individual which might prove adverse to the others. Absent the ability to make such a determination, the Defendants, if forced to trial absent a Bill of Particulars, will be denied their right to a fair trial guaranteed by the Sixth Amendment of the United States Constitution, and the effective assistance of council (*sic*) guaranteed by the Fifth Amendment of the United States Constitution.

Defendants' Memorandum of Law in Support for Bill of Particulars (Document No. 7) at p. 4.

Finally, merely because I find the defendants' waiver of their right to effective representation to be knowing and intelligent today in no way guarantees the continuing

validity of that waiver throughout the remainder of the proceedings against them. Under such circumstances, must I sit back and wait for a potential conflict to become an actuality? If my finding that there is a potential for conflict were based upon mere speculation, I too would agree that the court should not interfere with a defendant's choice of counsel. But, where the likelihood is great that a potential conflict may escalate into an actual conflict, and thus threaten to render the entire trial process null and void, I believe it is well within a court's discretion to anticipate the conflict and disqualify defense counsel.

In support of their argument that an actual conflict of interest is necessary before a valid waiver can be rejected, defendants cite the Supreme Court's recent decision in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), which held that to establish a violation of his Sixth Amendment right to the effective assistance of counsel, a criminal defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348. *Cuyler* dealt with issues substantially different from those presented in this case. *Cuyler* went to the Supreme Court on *certiorari* from a ruling of the Court of Appeals for the Third Circuit directing the district court to grant a state prisoner's petition for a writ of habeas corpus. Applying the standard enunciated in *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 210 (3d Cir. 1973), the Court of Appeals had held that Sullivan had been deprived of his Sixth Amendment right to the effective assistance of counsel because a possible conflict resulted from the joint representation of Sullivan and a co-defendant during their separate trials in state court. The Supreme Court reversed, holding that possible conflict was insufficient to constitute a violation of Sullivan's constitutional rights.

I am not persuaded that *Cuyler* requires a showing of an actual conflict of interest before defense counsel may be disqualified over defendants' knowing and intelligent waiver. In *Cuyler*, the trial (in the state court) had taken

place. It was an accomplished fact. What happened at the trial with joint counsel was history. To require a showing of actual conflict of interest to establish a violation of a defendant's constitutional rights in a completed trial provides no authority compelling a court to wait until an actual conflict arises before it may act to forestall a violation of those same rights. *Cuyler* did not involve disqualification of counsel on ethical grounds. *Cuyler* did not involve application of F.R.Crim.P. 44(c). As noted earlier in this opinion, Rule 44(c) is prospective in its thrust. Clearly the intent of the rule would be frustrated if a court were forced to await a constitutional violation before it could act to prevent it. Thus, while I recognize that the defendants have a right to counsel of their choice, that right is not unlimited and must yield to the court's overriding interest in protecting their rights to adequate representation and fair trial, and in preserving the integrity of its procedures.

Accordingly, for the reasons expressed in this opinion, I will grant the Government's motion to prohibit multiple representation and disqualify the firm of Sprague and Rubenstone from representing any of the four defendants.[3]

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3. My decision to disqualify defense counsel is based upon the conflict of interest which I find is likely to result from the multiple representation of the four defendants. The Government, in its Supplemental Memorandum in Support of Its Motion for Disqualification, has attempted to interject a new conflict. Specifically, the Government states that Sprague and Rubenstone also represented Officer James Kennedy during the grand jury investigation of the defendants and that Kennedy is a possible government or defense witness in the pending case. If this were the only ground for disqualification I would not be inclined to give it much weight, for to do so would permit the Government to create a potential conflict where none might otherwise have been likely to arise. Under the circumstances, however, where I have been persuaded that other grounds for disqualification are sufficient this added fact demonstrates the danger inherent in an attorney's attempt to represent multiple persons charged with unlawful activity.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 2, 1981

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-270

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN
JAMES KEWESHAN
SIDNEY LANDIS
THOMAS McNAMEE

Order

This 2nd day of December, 1981, it is

ORDERED that the Government's Motion to Prohibit Multiple Representation of Defendants is GRANTED and the firm of Sprague and Rubenstone is disqualified from representing any of the defendants in the above captioned action. It is

FURTHER ORDERED that each defendant shall within twenty (20) days cause substitute counsel of his choice to enter an appearance on his behalf, failing which the Court shall appoint counsel for each from attorneys registered under this Court's plan for appointment of attorneys under the Criminal Justice Act.

The Court having been advised of defendants' intention to file an immediate appeal from this Order, it is

FURTHER ORDERED that a Stay is GRANTED pending disposition of the appeal.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 4, 1981

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-270

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN
JAMES KEWESHAN
SIDNEY LANDIS
THOMAS McNAMEE

Order

This 4nd day of December, 1981, upon consideration of defendants' Motion for Reconsideration and/or Clarification of this Court's Opinion and Order filed December 2, 1981, it is

ORDERED that Defendants' Motion for Clarification is GRANTED, and the Opinion heretofore filed is clarified by inserting, as footnote 1(a) following the word "concedes" on the second line of the first full paragraph on page 5, as follows:

"1(a). I do not rely on defense counsel's apparent concession. Whether or not defendants concede it, based upon the presumption that privileged information has

been acquired as a result of the attorney-client relationship, *see United States v. Provenzano*, 620 F.2d 985 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980), logic does in fact mandate that, if separate counsel are ordered, Sprague and Rubenstone must be disqualified from representing even a single defendant."

/s/ ALFRED L. LUONGO

J.

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED JUNE 2, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3116

UNITED STATES OF AMERICA

v.

FLANAGAN, ROBERT
KEWESHAN, JAMES
LANDIS, SIDNEY
McNAMEE, THOMAS,

Appellants

(D.C. Crim. No. 81-00270-01/04)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS and HUNTER *Circuit Judges* and THOMPSON, *District Judge**

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel May 11, 1982.

* Honorable Anne E. Thompson, United States District Judge for the District of New Jersey, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 4, 1981 be, and the same is hereby affirmed.

ATTEST:

/s/ SALLY MRVOS
Sally Mrvos
Clerk

June 2, 1982

Certified as a true copy and issued in lieu of a formal mandate on July 20, 1982.

Test: /s/ FRANCIS R. MUTYSIK

Deputy Clerk, United States Court of Appeals for the Third Circuit.

ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED JULY 12, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3116

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS and THOMAS McNAMEE,
Appellants

(D. C. Criminal No. 81-00270-01/04)

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and THOMPSON *, *District Judge*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

* Hon. Anne E. Thompson, United States District Judge for the District of New Jersey, sitting by designation on panel rehearing only.

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ JOHN J. GIBBONS

Judge

Dated: JUL 12 1982

TRANSCRIPT OF RULE 44(c) PROCEEDINGS HELD BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ON NOVEMBER 12, 1981

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[1]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-270

U. S. A.

v.

ROBERT FLANAGAN
JAMES KEWESHAN
SIDNEY LANDIS
THOMAS McNAMEE

Philadelphia, Pa., November 12, 1981

Before HON. ALFRED L. LUONGO, *J.*

GOVERNMENT'S MOTION FOR HEARING AND TO PROHIBIT MULTIPLE REPRESENTATION

APPEARANCES:

LUTHER E. WEAVER, III, ESQ.
PETER F. SCHENCK, ESQ.
Attorneys for Government

BRUCE L. THALL, ESQ.
JIM LEONARD, ESQ.
Attorneys for Defendants

[2]

(Court convened at 11:00 a.m.)

The Court: Good morning.

Mr. Thall is not here.

Mr. Weaver: We have not seen him, Your Honor. The Government has not.

The Court: We will wait a few minutes.

Miss Richards, would you call Mr. Sprague's office to find out if anyone has left?

(Pause)

Mr. Thall: Good morning, Your Honor, I apologize for being late. We got a little tied-up in traffic.

The Court: All right.

All right. I have scheduled this morning only the Government's motion for hearing and to prohibit multiple representation. And, the reason I have scheduled only that motion would appear rather obvious, that if the Court should determine that multiple representation is improper, Mr. Thall would certainly not be in a position to argue the other motions.

We will hear the Government's presentation.

Mr. Weaver: Your Honor, the Government wants to state emphatically that at this time we are not

[3]

100 percent convinced that a conflict does exist. We filed the motion as according to Rule 44 of the Federal Rules of Criminal Procedure. A hearing must be held to determine whether or not a conflict exists where multiple defendants are represented by single counsel.

We would like to place certain things on the record, however, in the matter.

As in any conspiracy case, the evidence as to each of the four defendants charged in this case is not equal.

The defendants have filed a motion for severance, and the way the Government read the motion, the motion was filed by three of the defendants; that is defendants Landis, Keweshan and McNamee, alleging in part that there may be a prejudice if in fact they go on trial with Officer Flanagan.

We feel that the Government did counter that motion, arguing that severance was not required in this case, but we raise a question as to whether or not the filing of that motion is in and of itself evidence of a conflict, and also if it is alleged by the defendants themselves that there would be prejudice to be tried along with Agent Flanagan—with Officer Flanagan—whether or not the representation by the same counsel for all defendants at a joint trial would also result in a conflict of interest.

[4]

In addition, in that motion, the three defendants that I mentioned, state that they played a different role while they were on the street acting as police officers from Officer Flanagan; that is, that Officer Flanagan was the decoy officer. He would be the one who would put himself in a position to be robbed by a suspect, and that they would back him up coming onto the scene once the signal was yelled.

The Government will state that that is correct to a certain extent. We agree with that statement to this extent, and that is that the three defendants who filed that motion did have a different role in the decoy scenario as opposed to Officer Flanagan, and, we suspect to a certain extent the evidence will reflect that.

Therefore, those are the basic reasons why we filed the motion to explore whether or not there would be any prejudice on the part of any defendant in being represented by the same counsel.

The Court: Mr. Thall.

Mr. Thall: Your Honor, there are several things I would like to bring to Your Honor's attention.

First of all, I would like to add that in addition to the cases which we cited in our brief, I would also like to call the Court's attention to the case of Cuyler vs. Sullivan, which was decided by the Supreme Court

[5]

of the United States on May 12 of 1980, and is found at 100 Supreme Court Reporter, page 1708.

The Court: I have it.

Mr. Thall: O.K. All I want to refer to in that case specifically is, the language on page 1719 reflecting that, at least in the view of the Supreme Court, in order for there to be an actual conflict—excuse me.

> "In order to demonstrate a violation of Sixth Amendment rights, defendant must establish that an actual conflict of interest adversely affected his lawyer's performance."

This case, I think when read in connection with Rule 44C, suggests very strongly that even in the pre-Rule 44C context in which the Dolan case arose, which is cited in our memorandum, there has to be an actual conflict of interest as opposed to a potential conflict of interest in order for the Court to consider whether a conflict, potential, actual, exists, and if so whether the Court has the power to require that separate counsel be appointed. That is on the law.

In terms of the background of this case, Your Honor, what I propose to do is as follows:

I would first like to make some general statements respecting the representation here in the matters at issue; I would then like to provide to Your Honor in open

[6]

court the types of inquiries which were pursued with each of the individual defendants in order to make sure that they understood, as Your Honor ultimately has to conclude, whether or not potential conflicts which do lurk might cause them to want to have other counsel; and, awareness of those, nonetheless, suggesting to them that they want to stay with counsel that they have retained, the law firm of Sprague and Rubinstone.

Then I would propose that we put each of the four individuals, defendants, on the stand, so that Your Honor and Mr. Weaver, or us if Your Honor would so direct, can demonstrate to Your Honor's satisfaction that indeed the possible pitfalls which do face defendants in situations where there is multiple representation, have been made known to them, and that in fact they waive any question concerning those possible pitfalls knowingly, intelligently and voluntarily.

The Court: The real question, Mr. Thall, will arise when and if the Court is convinced that there is a serious potential for conflict of interest.

Mr. Thall: I do propose to address that, Your Honor.

The Court: I am virtually convinced of that now. And, the question that we really have to consider is whether the defendants can effectively, under

[7]

any circumstances here, waive their rights concerning that conflict and proceed with single counsel. And it appears to me that the only way to resolve that will be for an immediate appeal to be taken in the event the Court should determine to require the defendants to have separate counsel.

The potential for conflict just jumps out in this case and I just don't know how counsel could even undertake, under the circumstances, to attempt to represent all four of these defendants.

Mr. Thall: Perhaps I can address that, Your Honor.

The Court: Yes.

Mr. Thall: Let me state emphatically that from the first date these individual defendants did come into our office, both Mr. Sprague and I have, on several occasions, discussed with them the facts surrounding the matters at issue.

The Court: I assume you did, Mr. Thall.

Mr. Thall: And, I can also state categorically to Your Honor that having discussed with them individually and together, their knowledge of the facts surrounding the issue, and discussing with them different alternative tactics and defense strategies which could be employed in the context of this case—and, Your Honor, I am making these representations to you with the approval of my clients

[8]

for the limited purposes of these proceedings, even though they are attorney-client communications——

The fact is, Your Honor, there is no actual conflict, and our office, I think, has a reputation for being——

The Court: Mr. Thall, I really don't want to hear what counsel's assessment of the situation is.

I want to explore with each of the defendants, which I will do myself, whether they understand the potentialities here.

I am sure that you have explained it to them, and I will inquire of them as to that. I am sure they will give me all the right answers in that regard.

Mr. Thall: If I may, Your Honor, might I proceed to disclose to the Court the specific areas of potential conflict which have been discussed with each of the individual defendants? I think that might be of assistance to the Court in determining the focus of its own inquiries.

First of all, Your Honor, it has been discussed with each of the defendants the fact that each is entitled in both opening and closing statements made by counsel on their behalf, to set each one apart from the other defendant to say that it wasn't me who did it, it was the other guy; that that is a right that they have,

[9]

assuming that the facts as they understand them are in fact consistent with that approach; and that by having one counsel, or by having representation from one office, even if there are individual lawyers representing each defendant, there is a potential for conflict in that such argument would not likely be made either in opening or in closing.

It was also discussed with each defendant that in the event that the matter actually did go to trial, and in the event that one were convicted of any or all of the offenses contained in the indictment, that at sentencing there could be a potential conflict given joint representation by one office of several defendants.

The Court might view it more difficult for one office to argue that the major guilt here is ascribable to defendant A as opposed to defendant C, when in fact all lawyers—all defendants are being represented by one counsel.

In addition, each was advised that in most of the counts of the indictment all four are jointly charged, and that the fact of joint representation on one office might cause a jury to infer that if one were guilty all would be guilty; that the fact of joint representation in and of itself might be a factor that a jury—impermissibly but nonetheless might consider in determining the questions

[10]

of guilt; each was advised, Your Honor, that under certain circumstances the Government might tender either immunity to one defendant to convince him to, or compel him to testify against another, or that the Government might offer a plea of guilty with a recommendation of no sen-

tence, or even offer to dismiss charges; and that under such circumstances an individual defendant, were that to happen, might be compelled, or advised, to testify as to information within his knowledge which could redound to the other's detriment; and that counsel would not have been aware necessarily of such knowledge were it not for the fact of joint representation.

In this regard, Your Honor, I would also like to state that defendants have stated that even were separate counsel appointed for each, they would want joint trial strategies and would make themselves available to counsel so that each counsel would be apprised to the fullest extent possible of all factual knowledge in the possession of each.

The Court: That is a totally separate problem.

You see, the trial strategy that may be finally adopted with one counsel is far different from the decision that is made when each is represented by separate

[11]

counsel. They might come to the same decision as to the strategy to employ, but with one counsel that strategy may be suspect and may lead to a conflict of interest result, whereas with four counsel representing each individual defendant, it is a much less likely charge and possibility.

Mr. Thall: And, Your Honor, I am not making a representation that if there were four separate counsel the trial strategy adopted would be the same. All I have stated was that the defendants wish there be a joint trial strategy.

The Court: That is a matter that can be accomplished with separate counsel, and we all know that, Mr. Thall.

Mr. Thall: I am not saying it can't be, Your Honor.

The point is that the information elicited from each defendant, factual information, would be made available

to all other counsel just as though they were one counsel or one firm providing representation.

Each individual was advised, Your Honor, that it is likely, given the nature of the charges as we understand them, that there will be a greater quantum of evidence adduced against Defendant Flanagan as opposed to the other three, that it is possible that such evidence

[12]

might appear more serious in the eyes of jurors than the evidence adduced against the other three; and that by dint of joint representation it is possible that the jury could infer the commission of a more serious act against one of the other three merely because of such joint representation.

Each has been advised that given the fact that it is likely more evidence will be adduced against one as opposed to the others, counsel might spend more time concentrating its defense efforts toward that one as opposed to the others, which in itself somehow might cause the possibility for a conflict to exist.

Each has been advised that he possesses the right to testify on his own behalf; that if he chooses not to testify no adverse inferences can be drawn by the jury, but that if that one defendant chooses to testify and others do not, the mere fact of joint representation may cause a jury—improperly, but nonetheless may cause a jury to infer guilt on the part of the person not testifying in ways that might not occur where there is separate counsel.

I might add that each has been advised of his right to counsel, and of the fact that were he not to have sufficient funds to pay for an attorney, the Court would appoint counsel.

Each defendant has also been advised that

[13]

should he choose to testify, he may, on cross-examination

from the Government, be asked questions respecting his knowledge of activities of other defendants.

Each has been advised that should counsel choose to present character or reputation testimony on behalf of some, but not all four defendants, by mere fact of joint representation alone a jury might infer a negative character or reputation on the part of such individual.

These are the nature of the specific subjects gone over with each of the individual defendants.

I again state, Your Honor, that we do not see an actual conflict at this time.

The Court: My inquiry, Mr. Thall, quite apart from your argument, will be addressed to whether a conflict is likely to arise, in the words of Rule 44C.

Mr. Thall: I understand, Your Honor.

The Court: So that it is quite apparent that there is no actual conflict today. I am looking down the road.

Mr. Thall: I understand, Your Honor.

Now, if Your Honor wishes, we could proceed by calling defendants to the stand, or however Your Honor—

The Court: I will proceed in my own fashion with an individual inquiry, and then each side may do as

[14]

it pleases.

I will make an inquiry of each of the defendants, and even if they answer the questions a certain way I will have concerns.

Mr. Thall: I understand, Your Honor.

The Court: Robert Flanagan.

You may stand right here.

Would you swear each of them in turn for this purpose?

(Robert Flanagan, sworn.)

The Court: State your name, please?

The Witness: Robert Flanagan, F-l-a-n-a-g-a-n.

The Court: Let it also be understood that if it becomes necessary in the course of this inquiry to clear the courtroom, including Government counsel, in order not to prejudice any of the defendants in future conduct of the case or the trial, I will do so.

Mr. Thall: I appreciate that, Your Honor.

The Court: And, if at any point it appears to anyone, Mr. Thall or any of the individual defendants, that we are encroaching in critical areas, you need only sound an alarm and I will clear the courtroom for this purpose.

EXAMINATION BY THE COURT

Q. Mr. Flanagan, there are serious charges levelled against

[15]

you and your three co-defendants in this case, and you are aware of that?

A. Yes, sir.

Q. You are aware also, I assume, that each of you is entitled to be represented by counsel of his own choice.

A. Yes, sir.

Q. Now, Mr. Thall has already represented to the Court that extensive discussions have taken place in which it has been pointed out that there are many potential areas of conflict in the course of the criminal proceedings in having more than one defendant represented by one attorney; is that so?

A. Yes, sir.

Q. Now, do you fully appreciate that at some point in the trial it may occur to one of the defendants that he ought to cop a plea, that he ought to make a deal, that he ought to get out and do the best he can for himself?

A. Are you asking me if that is a possibility?

Q. I am asking you whether you are aware that in the course of the trial that that could happen?

A. I don't know how to respond to that question, Your Honor. You mean personally involving this particular matter itself?

Q. In this matter, yes.

A. I would only have to assume and I wouldn't want to

[16]

make that judgment.

Q. You would have to assume what, that it won't happen, or it could happen?

A. That it won't happen.

Q. All right. So that your judgment in proceeding with one attorney is based on your present expectation that none of your co-defendants will turn tail and run.

A. That's correct.

Q. All right.

You are aware, though, that it is a possibility, human nature being what it is, that one of the four may turn out to be not quite as resolute and insistent as he is now that we will stand together.

A. Not with my knowledge of the cases in question, Your Honor. My answer to that would be no.

Q. You just don't believe that that could possibly happen ?

A. No, sir.

Q. Now, in the event that you are wrong and one of the other defendants should decide to turn tail, do you realize that if that defendant were to take the stand, if you were represented by separate counsel your attorney would have the right to cross-examine that person. If you are represented, all of you, by the same attorney, you could not expect the one attorney who had represented this person to cross-examine him, could you?

[17]

A. No, sir.

Q. So that you would run the risk by single representation that if you are wrong in your assessment of all the defendants being willing to stand together throughout, you would be giving up a chance for cross-examination of one of your co-defendants if he should take the stand?

A. Under those conditions, yes, sir.

Q. Now, Mr. Thall has said that one of the things he discussed with all defendants is that normally each defendant represented by separate counsel would have his own opening statement to the jury in which he would paint his own client as the saint, if you will, and if necessary paint the others as not so saintly if each was represented by a different attorney; and by the same token, in the closing arguments to the jury the same thing would happen: Each attorney would attempt to minimize his own client's involvement and maximize, if the evidence pointed to guilt on somebody's part, the involvement of the other defendants; do you realize that that is what would happen if the case proceeded with each with separate counsel?

A. Yes, sir.

Q. And, that if there is one attorney, then all of that opportunity goes out the window, because one attorney representing four people can't paint one out to be a saint and another not so saintly.

[18]

A. Yes, sir.

Q. And you would be willing nevertheless to proceed with the one attorney?

A. Yes, sir.

Q. It has also been explained to you that it is possible that if the case goes to trial, that one or more of the defendants may decide to put on character evidence, or good reputation evidence.

A. Yes, sir.

Q. And that if not all put it on, then this could look—cause the jury to get a bad impression of the one that didn't put on good reputation evidence.

A. Yes, sir.

Q. So, it puts you all in the same position even though your backgrounds may be different.

A. That's correct.

Q. First of all, let me ask whether financial considerations are involved in your decision to be represented by one attorney?

A. No, sir.

Q. That if you were required to have separate counsel, this would present no problem to you?

A. Not to my present knowledge, Your Honor.

Q. So that if the Court were to order that there be separate counsel for each of you, this would not present

[19]

a financial burden.

The reason I ask that question is, if it does, I want you to understand clearly that if it does present a financial problem, the Court would appoint counsel to represent each individual defendant.

A. I could only assume it wouldn't. However, it would depend on the decision made by our Union, the Fraternal Order of Police.

Q. All right. So that there is someone who is furnishing financial support for your representation?

A. That's correct.

Q. All right. I want you to understand in your final decision here, that if financial considerations are the problem, the Court will appoint counsel if it is necessary to appoint separate counsel.

A. I understand, Your Honor.

Q. I earlier mentioned that if one of the defendants should decide to take the stand, that he would be—that the other defendants would be entitled to cross-examine that defendant; so would the Government be entitled to cross-examine that defendant, and, the Government would be entitled to cross-examine that defendant concerning all of the defendants, not just the one who took the stand.

Are you aware of that?

A. Yes, sir.

[20]

Q. Now, Mr. Flanagan, in light of—of course there is also the problem of sentencing.

If all of you should be convicted—and I want to put it in these terms first: If all defendants should be convicted, normally attorneys who represent defendants who have been convicted make an effort, the last effort when it comes to sentencing, to get some kind of a break from the sentencing judge, pointing out that even if my client has been found guilty by the jury, he was such a small part of this, he was practically innocent even though the jury found him guilty; it was really the other fellows who were bad people. Sentence them and let my fellow walk out on the street; do you understand that?

A. Yes, sir.

Q. If you are all represented by one attorney, it would be improper for him to make any such argument, do you understand that?

A. Yes, sir.

Q. Now, with all of those considerations, is it your decision that you want to waive your right to be represented by separate counsel?

A. Yes, sir.

Q. All right. Thank you. You may return to your seat.

A. You are welcome.

The Court: Does anyone else have any ques-

[21]

tions before he returns?

Mr. Thall: I have none, Your Honor.

Mr. Schenck: Just one, Your Honor.

By Mr. Schenck:

Q. Mr. Flanagan, you understand that even if it were decided to present what would be consistent or a united defense among the four of you, that if you were represented by separate counsel, that counsel could present the one united defense and also present to the jury alternative defenses, such as, "My client was not present at this particular scene," and would not necessarily have to give up a united defense; do you understand that?

A. That's correct.

Q. Thank you.

(Witness excused.)

The Court: James Keweshan.

(James Keweshan, sworn.)

The Court Reporter: For the record, would you state your full name, please?

A. James Keweshan, K-e-w-e-s-h-a-n.

By The Court:

Q. Keweshan is the correct way to pronounce that?

A. Yes.

Q. Officer Keweshan, you have heard me address a number

[22]

of questions to Mr. Flanagan. I don't have the kind of memory that will enable me to pose all of the same questions to you, but I am going to try to go through generally the same procedure.

There are four of you here who are charged with a crime, a very serious crime.

A. Yes, sir.

Q. You understand, do you not, each of you is entitled to be represented by a separate attorney.

A. Yes, sir.

Q. Do you understand that?

A. Yes, sir.

Q. And that if you are represented by a separate attorney, that attorney would be obligated to represent just you alone, and to do that which is in your best interest as opposed to what may be in the joint best interest of the four of you; do you understand that?

A. Yes, sir.

Q. Do you understand that in the course of the trial it is possible that one of the four, or more than one of the four, may have a change of heart and decide to make some kind of a deal for himself, do you understand that?

A. Yes, sir, I understand that.

Q. And that if that should happen it would create conflicts on the part of the attorney who is attempting to

[23]

represent all four; do you understand that?

A. Yes, sir.

Q. So, for example, if the Government were to offer to you some sort of immunity for testifying against your colleagues, and if you were to consult with counsel, could you be sure that counsel would have—joint counsel—would have your best interest at heart in advising you whether you should go along with that deal, or would he be more concerned with the best interests of the four of you?

A. I understand that, sir. I understand the possibility there.

Q. But, do you believe that counsel could, under those circumstances, advise you as to your best interest?

A. Yes, sir.

Q. If he did, would he not be advising you in a manner that might be against the best interests of the other four?

A. I don't believe so.

Q. And is that belief on your part predicated on the belief that throughout you will retain and continue to present a united front?

A. Yes, sir.

Q. And, therefore, you have ignored the hypothetical that I have posed to you that at least one of you would change his mind, including you.

[24]

A. That's right.

Q. You are saying in effect that there is no chance you will change your mind.

A. That's correct.

Q. Are you as sure about your fellow defendants?

A. I believe so, yes, sir.

Q. Do you recognize it as a part of human nature that people do occasionally change their minds?

A. I understand that.

Q. And that they do occasionally develop a belated concern for their own best interest rather than joint best interest with others?

A. I understand that, sir.

Q. Now, do you understand that if that should happen, and one of the other defendants were to make a deal with the Government and become a witness, that your attorney would not be able to cross-examine that defendant if he should testify against you?

A. I understand that, sir.

Q. Because of the prior attorney relationship he would simply not be permitted to, do you understand that?

A. Yes, sir.

Q. And, if that one defendant were to take the stand, you know that the Government would be entitled to cross-examine as to the activities of all of the defendants,

[25]

and your attorney would not really be in a position to counter that cross-examination as a separate attorney might be?

A. I understand that.

Q. Now, I have asked Mr. Flanagan and I will ask you:

Do the financial considerations here enter into your decision to be represented by one attorney?

A. No, sir.

Q. And that is for the same reason, that you are receiving some financial support from your Union for this representation?

A. That's right.

Q. So that if the Court were to decide that the potential for conflict is so great that I must appoint separate counsel, or that I would require separate counsel, you would furnish your own separate counsel at your own expense, or at the expense of the Union?

A. I would have to go to the Union, yes.

Q. But, I want you to understand that if the Union does not give you that financial support, if the Court decides that separate counsel must be appointed in the case, the Court would undertake to do so without expense to you?

A. I understand that, sir.

Q. Do you understand also that in the course of the trial as bearing on guilt or innocence, one or more, and less

[26]

than all of the defendants might decide to put on character or reputation testimony.

A. I understand that.

Q. And, if that happens it reflects badly on the defendant or defendants who don't put it on, and your attorney would have to probably consider the effect overall on all four defendants before deciding to put on reputation or character evidence on behalf of less than all; do your understand?

A. I understand that, yes, sir.

Q. And that this is another area of potential conflict on the part of counsel?

A. I understand that, sir.

Q. It has been suggested that the defendants have agreed upon a trial strategy which would, in effect, present a united front; a unified kind of defense.

Are you aware that that same strategy could be adopted even if there were four separate attorneys?

A. Yes, sir.

Q. And, are you aware that if that separate strategy were adopted with four separate attorneys in the case, you would at least have the assurance that your attorney representing you alone had made that decision in your best interest as opposed to the best interest of the four of you?

A. I understand that.

[27]

Q. Now, notwithstanding all of these things that I have questioned you about, is it your desire to waive this potential conflict which appears quite apparent in this case, and to be represented by one attorney?

A. Yes, sir.

Q. All right.

The Court: Any other questions?

Mr. Schenck: The same one, Your Honor.

By Mr. Schenck:

Q. You understand that separate counsel, while presenting the unified defense could present other defenses for you, or alternative defenses for you, regarding your own involvement or culpability; do you understand that?

A. I understand that.

Q. And you understand that that type of alternative defense, or alternative presentation to the jury, would be extremely difficult if not impossible for a single counsel representing all four of you?

A. I understand that.

The Court: Thank you, Mr. Keweshan.

(Witness excused.)

The Court: Sidney Landis.

(Sidney Landis, sworn.)

[28]

The Court Reporter: State your full name, please.

The Witness: Sidney J. Landis, L-a-n-d-i-s.

By The Court:

Q. Mr. Landis, you are charged here with a very serious crime along with three co-defendants. You understand, do you not, that you are entitled to be represented by separate counsel?

A. Yes, sir.

Q. Now, when a defendant in a criminal case has his own separate attorney, he has the assurance that his attorney is making decisions and presenting a case in his client's own best interest; not necessarily in the best interest of other defendants, do you understand that?

A. Yes, sir.

Q. And that if four defendants are represented by one attorney, that that attorney necessarily will be making decisions in the best—joint best interest of four defendants; not necessarily in the best interest of one.

Do you understand that?

A. Yes, sir.

Q. And, you might be the one who is sacrificed in the common good; do you understand that?

A. Yes, sir.

Q. If you were represented by separate counsel, you

[29]

understand that counsel would have the opportunity in opening statements and closing arguments to the jury to try to convince the jury that you had very little to do with whatever criminal activity the Government might have

shown, and that if there was criminal activity it was the other defendants, not you; do you understand that?

A. Yes, sir.

Q. But, when you are represented by one attorney, he can't do that if he is going to have fidelity to all four defendants, if he is going to do his job properly for all defendants; do you understand that?

A. Yes, sir.

Q. Do you understand also that although you all four appear to have agreed here and now to sink or swim together, that one of you may have a change of mind?

A. Do I believe it could happen?

Q. You understand that it might happen?

A. Yes, sir, I understand that.

Q. Human nature being what it is, people sometimes do change their mind; you know that, don't you?

A. Yes.

Q. Now, if that should happen and a deal were to be offered to one of the defendants with the representation by one attorney; if for example the deal were to be offered to you, for example: The Government were to say to you,

[30]

"Mr. Landis, we will offer complete immunity to you if you will testify against these other three men." And if you were to consult with your attorney who happens to be the attorney also for the other three defendants, do you believe that he would be able to advise you in your own best interest under those circumstances?

A. Yes, sir.

Q. Even though you recognize that that would run counter to the common defense that has already been agreed upon?

A. Yes, sir.

Q. And, you think that he would be able to advise you whether you should accept the deal?

A. Yes, sir.

Q. Well, doesn't it follow necessarily from what has happened thus far, that he would have to say to you that you can't accept that deal because we are all in this together—or, you all are in this together?

A. Yes, sir.

Q. You recognize that as the possibility, don't you?

A. Yes, sir.

Q. So that if the Government were to offer you a deal, you would not have the benefit of the advice of counsel at that time, counsel representing you and your interest.

A. I understand that, sir.

Q. All right.

[31]

Q. It is also possible in the course of the trial that the evidence would appear to be heavier against one defendant than other defendants, with the result that the attorney who is representing all four of you may be concentrating on trying to cut down the evidence against that one defendant, and in doing so he may tend to overlook the defense of the other defendants; do you recognize that possibility?

A. Yes, sir.

Q. Do you recognize also that if one or more of the defendants takes the stand, that the other co-defendants wouldn't have a real chance to cross-examine that defendant who now becomes a witness because the attorney had previously been his attorney and he wouldn't be permitted to cross-examine him because of the prior attorney-client relationship; do you understand that?

A. Yes, sir.

Q. So that if that should happen in the course of the trial, and if one of the other defendants takes the stand and puts the finger on you, your attorney would be helpless to cross-examine him; do you understand that?

A. Yes, sir.

Q. And, of course, if any defendant takes the stand, the Government has a right to cross-examine that defend-

ant as to the activities of all defendants, and again, the attorney wouldn't be able to counter that very well because of his

[32]

prior attorney-client relationship with that witness; do you understand that?

A. Yes, sir.

Q. I take it that your answer with respect to the financial considerations is the same as Mr. Flanagan and Mr. Keweshan, that as far as you are aware the Union will put up the money for counsel, so that is not a serious consideration, is that correct?

A. That's right, sir.

Q. Now, I want you to understand that if that shouldn't happen to be so and if the Union balks for having to pay for separate counsel, counsel would be appointed for you at no expense to you; do you understand that?

A. Yes, sir.

Q. It is also possible that some, but not all of the defendants, might wish to put on reputation or character testimony, and if less than all the defendants do that it may reflect adversely on the ones who don't put on character or reputation evidence; do you understand what I am saying?

A. Yes, sir.

Q. And that this might cause counsel who represents all four to make a decision not to put on any character evidence on behalf of any: do you understand that?

A. Yes, sir.

Q. All right. Now, in light of all of the questions that

[33]

I have posed to you, is it your desire to waive this conflict of interest which is so apparent to me in this case, and to proceed with being represented by one attorney?

A. Yes, sir, it is.

Q. Are you aware that if you were represented by an attorney whose interests—who would be representing your interest alone, that he along with the other attorneys in the case could still come to the decision, in so far as trial strategy is concerned, to present a unified joint defense; they could still come to that same decision, do you understand that?

A. Yes, sir.

Q. And that if you were represented by separate counsel, that even if he came up with a decision to present a unified defense where all of you go down the same path together, your own attorney could still present other types of defense that would be applicable to you alone and not to the others; do you understand that?

A. Yes, sir.

Q. And if you are represented by one attorney you give up that chance?

A. Yes, sir, I understand.

Q. All right. Thank you.

The Court: Any other questions?

Mr. Thall: Just one clarification, Your

[34]

Honor.

The Court: Yes.

By Mr. Thall:

Q. Mr. Landis, if the Government were to right here and now offer you total immunity for all the charges in return for your testimony against the other defendants here, do you believe that you could discuss that offer with the law firm representing you and that it would, in your best interests, give you its best advice as to what you want to do?

A. Yes.

Mr. Thall: No further questions.

The Court: I am afraid, Mr. Thall, that that represents a conflict in and of itself.

You may step back, Mr. Landis.

Quite clearly, if such an offer were made he would have to consult separate counsel, in my view.

Mr. McNamee.

(Thomas McNamee, sworn.)

The Court Reporter: State your full name, please?

The Witness: Thomas McNamee, M-c-N-a-m-e-e.

By The Court:

[35]

Q. Mr. McNamee, it may seem rather silly for me to go through these same questions with each and every one of you, but the law makes it clear that I must address these questions to each one of you individually. I can't assume that you have listened to the other questions and answers.

You have been charged here with very serious criminal charges; do you understand that?

A. Yes, sir, I do.

Q. And, do you understand that you are entitled to be represented by your own attorney?

A. Yes, sir.

Q. An attorney whose loyalty would be owed to you alone without concern or consideration for the other three defendants.

A. Yes, sir.

Q. Do you understand that?

A. Yes, sir.

Q. Now, by being represented by one attorney, necessarily you will be giving up certain rights that you have; do you understand that?

A. Yes, sir, I do.

Q. And, I would not undertake to assess anyone's relative role in this overall charge. But, according to certain papers that have been filed by present counsel, it has been suggested that the role of the four defendants is of a

[36]

differing magnitude; they do differ; that they don't all have the same part in this alleged conspiracy; do you understand that?

A. Yes, sir, I do.

Q. And that necessarily with one attorney and a unified defense, it is all or nothing; everyone either wins or loses; that is the approach that has to be taken?

A. Yes, sir.

Q. Do you understand that in the course of these proceedings one of the defendants might be presented with an offer from the Government of a plea bargain, or immunity, or something, in which a break is offered to one defendant at the expense of the others; in other words, we will offer you a deal if you will testify against your co-defendants.

Do you recognize that as a possibility?

A. Yes, sir, I do.

Q. If such a deal were to be offered to you, is it your belief that you could be advised properly by the present attorney who represents all four defendants as to whether you should accept or reject that offer?

A. Yes, sir.

Q. You think you could be?

A. Yes, sir.

Q. If one or more of the defendants were to accept a deal with the Government and take the stand, or even if

[37]

they don't accept a deal with the Government, if they were

to decide to take the stand and testify in their own defense, do you understand that the joint counsel for the four defendants would not be in a position to cross-examine that defendant?

A. Yes, sir.

Q. Because of the attorney-client relationship that existed.

A. Yes, sir, I understand.

Q. He would not be able to cross-examine that defendant; or if that defendant decided to make a deal with the Government even though the attorney would no longer be representing him, he still couldn't cross-examine him because of the prior attorney-client relationship; do you understand that?

A. Yes, sir, I do.

Q. If one or more of the defendants takes the stand, then the Government is entitled to cross-examine that defendant concerning the activities of all the defendants, not just the one who took the stand, and again, the joint attorney would have his hands somewhat tied in the kinds of questions he could ask to counter the cross-examination of the Government; do you understand that?

A. Yes, sir.

Q. Also, in opening statements and closing statements, individual counsel of course always paint their own client

[38]

as the least culpable, or the most angelic of all of the people involved, and point the finger usually at the others and say, "Well, if there is any proof at all, it is the other fellows, not my client."

Do you realize that joint counsel cannot do that, not if he is going to represent all four; he has to just talk generally about all four and not just say, "Oh, well, Mr. McNamee, at least you ought to be satisfied he had nothing to do with this." Do you realize that?

A. Yes, sir, I do.

Q. So that you would be giving up a very important right, and that this is a possibility in the course of a trial that the evidence might be far greater against the other defendants than against you, and yet counsel would be very restricted in his opportunity to point out the fact that the others were guilty but you were not; do you understand that?

A. Yes, sir, I do.

Q. And also, if the evidence should prove to be much more damaging against one of the defendants than against the others, you understand, of course, that joint counsel then would be concentrating most of his defense efforts on behalf of that one defendant and sometmes it might appear to be at the expense of the defense of the other defendants, do you understand that?

[39]

A. Yes, sir, I do.

Q. Do you also understand that as part of the trial on guilt and innocence defendants are entitled to present as substantive evidence reputation evidence, good character evidence, and that if less than all of the defendants were to present such evidence it would reflect adversely against the one or two defendants, or three defendants that presented no character evidence; do you understand that?

A. Yes, sir, I do.

Q. And that this might cause counsel, joint counsel, to advise not to put on such evidence; do you understand that?

A. Yes, sir.

Q. I assume that in so far as the financial considerations are concerned, your answer is the same as Mr. Flanagan's, Mr. Keweshan's and Mr. Landis: You are expecting the Union to furnish financial support for whatever representation you require, is that correct?

A. That is correct.

Q. Now, in the event that the Union should balk at putting up money for separate attorneys if the Court de-

cides that separate attorneys are in order here, I want you to understand clearly that if you can't afford it or even if you can afford it, if the Court orders that separate counsel be appointed, that it would do so without expense to you;

[40]

do you understand that?

A. Yes, sir.

Q. So, I want that to be part of whatever decision you finally announce.

Now, there has been a decision made, as announced to the Court by Mr. Thall, that the defendants have decided to put on a unified defens you decided to put on the same defense for all defendants.

Do you understand that this same decision could be made even if each defendant was represented by his own separate counsel?

A. Yes, sir.

Q. But that if that decision were made by each defendant represented by separate counsel, we could at least be sure that each decision was independently arrived at with separate advice of counsel; do you understand that?

A. Yes, sir, I do.

Q. Whereas the present decision to put on a unified defense may be suspect because it is one attorney who is advising four defendants as to what they should do; do you understand that?

A. Yes, sir, I do.

Q. Do you understand that if you did have separate counsel and even if separate counsel decided to go along with the unified defense, he might nevertheless in your

[41]

best interest present some separate or alternate kinds of defense that would apply only to you and not to the other defendants; do you understand that?

A. Yes, sir.

Q. And that by being represented by joint counsel you give us that chance to have separate and independent defenses set up for you.

A. Yes, sir.

Q. Now, in light of all of these questions that I have posed to you, is it your desire to waive this very apparent conflict of interest on the part of counsel?

A. Yes, sir, it is.

Q. And that you wish to go to trial being represented by this one attorney, or one law firm.

A. Yes, sir, I do.

The Court: Any other questions?

Mr. Schenck: No.

Mr. Thall: No.

(Witness excused.)

The Court: All right. I would like——

Mr. Thall: Your Honor, if it would be all right with Your Honor, there are about two things that I would like to suggest in response to questions you have asked.

[42]

The Court: I am not quite finished. But, all right, you may make your suggestions, but I am not quite finished.

Mr. Thall: First of all, Your Honor, in connection with your questions you posed respecting pleas, the possibilities of offers by the Government and some deal ranging from immunity to a plea, I think it is important to note that in that instance were there to be a conflict, it would be caused by the Government, not by any acts which may or may not have been committed by the defendant; and that if in fact the mere offer of a plea to one individual were sufficient in and of itself to require the retention of separate counsel, I don't think that that would be proper for the following reasons:——

The Court: Mr. Thall, I really don't care to hear extended argument on that. These are possibilities that all loom on the horizon, and I have to concern myself with whether they are real possibilities.

Mr. Thall: It may then be appropriate, Your Honor, to suggest the Government make a representation respecting its determination whether or not pleas are to be offered——

The Court: No, I would not ask the Government to make any representation at this point.

The question is, what can happen, not what

[43]

will happen or is likely to happen; only, these are considerations that are always present in any criminal case.

Mr. Thall: Understood, Your Honor.

The Court: Now, I would like to offer the opportunity to each of the defendants to make a statement in his own words. But, for this purpose I will clear the courtroom, including Government counsel.

A Newspaper Reporter: Is that the press too, Your Honor?

The Court: Everybody.

(At this time Mr. Weaver, Mr. Schenck, an FBI Agent at counsel table and all spectators in the courtroom withdrew from the courtroom.)

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[44]

(The following colloquy took place in the presence of the four defendants, Bruce L. Thall, Esq., Jim Leonard, Esq., two law clerks of Judge Luongo, the court stenographer and the Court itself:)

The Court: All right, Mr. Flanagan, would you come forward again, please?

Would you please tell me in your own words why you want to be represented by one attorney when it is so apparent that there is going to be conflict arising in the course of this trial? Tell me in your own words.

And, I have cleared the courtroom. I don't have the Government attorney here or anyone else. Just tell me in your own words, because I want to understand why you are giving up this very important right.

Mr. Flanagan: Sir, I can only explain it as a layman rather than as an attorney.

The Court: Yes. Just give it to me in your own words.

Mr. Flanagan: All right, sir. I will explain it this way:

Early-on when this situation first developed, and discussing the matter with my colleagues, we determined that we wanted the firm of Sprague & Rubenstone; Mr. Thall and Mr. Leonard are attorneys of the firm.

[45]

We spent quite a bit of time, personal time, attending to the matters relating to this particular situation, discussing particular, specific details regarding the allegations that these attorneys who are present here today are now presently aware of.

I can't speak in behalf of my colleagues, but personally I got—I have developed a large amount of confidence, I fell extremely comfortable with the way the matter has been handled up to the present time.

We have been informed as to every proceeding regarding the matter. And, the issue, as I take it, concerning the allegations, and as I know the cases myself being personally involved in them, I can attest for my behavior and I believe I can also attest for my other brother officers' behavior in these matters.

The Court: Mr. Flanagan—and this is the concern that I want to express—there is no attempt, of course, on anyone's part, to question the ability or integrity of Mr. Sprague, Mr. Thall, and their office. That is not the point at all.

The problem is created because experience has shown in the past that it is almost impossible to avoid conflict of interest where more than one defendant is represented by one attorney.

I have tried to make it abundantly clear

[46]

that it would be at no expense to the defendants to have separate counsel; that there are possibilities, human nature being what it is, that at some point the interests of the defendants may diverge, even though today that appears very unlikely and, it is just incomprehensible to me that nevertheless all four of you wish to proceed with the same attorney. And this is why I wanted you to state in your own terms. And up to now you have simply said it is because you have great confidence in the way Mr. Sprague has advised you and represented you up to this point.

But, you do not seem to have really addressed yourself to what could happen in the future in deciding to forego separate counsel.

Mr. Flanagan: Yes, sir. I appreciate your concern. It seems very apparent that you are trying to advise us as to possibilities that may arise.

I presently—and I am being direct and frank and candid when I say this, at this present point in time I can't comprehend or conceive——

The Court: Of course you can't.

Mr. Flanagan: Well, I am just——

The Court: But, it won't shock you to death if it happens, will it?

Mr. Flanagan: Yes, it would.

The Court: It would?

[47]

Mr. Flanagan: Yes, it would.

The Court: But, you will have been forewarned that those things happen.

Mr. Flanagan: Yes, sir.

The Court: And when it happens, you realize then you are going to have a problem.

Mr. Flanagan: When and if it happens, Your Honor. Yes, sir.

The Court: Yes. And, you are just convinced it isn't going to happen.

Mr. Flanagan: In this particular issue, yes, sir.

The Court: Maybe you need to grow a little older. Thank you.

Mr. Flanagan: Thank you, sir.

The Court: Mr. Keweshan.

Again, I would just like you to tell me in your own words why you want to do it this way with one attorney.

Mr. Keweshan: Well, like Robert Flanagan stated, I have every confidence in Mr. Sprague's firm. I don't think I would feel comfortable with another firm other than Mr. Sprague's, maybe due to the reputation that they have. And, once again, I can't see anybody even being

[48]

approached to make a plea bargain or anything like that, in this trial.

The Court: It could happen.

Mr. Keweshan: I can't say.

The Court: It is also possible that even without plea bargains that the case may be much stronger against one than against another, in which case Mr. Sprague can only argue with one mouth; he can't argue with four mouths for four different people.

Mr. Keweshan: I realize that, sir. But, under the situation of the cases they are addressing, I can't see any evidence that they could prove us wrong on it.

The Court: Suppose they do? That is where the conflicts arise. You see, there is never a problem of a conflict when there is an acquittal. Nobody ever argues about a conflict. It is only when there is a conviction, then defendants say, "Oh, but I was not properly represented." And we have to be concerned about that.

Mr. Keweshan: I understand that, Your Honor.

The Court: Very properly, because we have to make sure you get the best possible defense you can get, and with four attorneys you can still have the benefit of whatever plan and strategy there is. But, you would have the assurance that each one is prepared, each attorney would

[49]

be looking out for his own client and not for four people.

It is always possible, of course, that one of you may be far more deeply involved than the others, which means necessarily that somebody else is far less involved. And, it is possible then that one can get out, or two can get out, but not four. Whereas the way you are going now, one or two of you may be sacrifical lambs because you sink or swim, all four. You either all go in or you all go out.

It is still your decision?

Mr. Keweshan: Yes, sir.

The Court: All right. Thank you.

The Court: Sidney Landis.

Again, I invite you, in your own words.

Mr. Landis: Basically what the other two have said, Your Honor. I am very happy with Mr. Sprague. I think he is the best attorney that I could have.

And, as far as the other men copping a plea, I don't think so. In fact, I know so. I have worked with these men and I know who they are, and what they are, and what they are capable of. And, you know—as well as I know myself.

I know I didn't do it, and they didn't do it either.

[50]

The Court: Well, the point is that the case might not necessarily be the same against all four defendants and, with one attorney, he has no choice. He has to present just one case.

Mr. Landis: Yes, sir. I understand.

The Court: Trying to get all four off. Then, if he does that, one or two innocent people might go down the drain with the others.

Mr. Landis: We are all innocent, Your Honor; all four.

The Court: You are not innocent until the jury says so. You are innocent now; you won't be guilty until the jury says so. But, actually speaking, unless the jury says you are innocent, you won't be innocent after the trial. You are innocent now. You have the presumption of innocence, all four of you.

Mr. Landis: Yes, sir, I understand.

The Court: But, after the trial, it is only if the jury says so that you will be innocent.

And, what I am saying is, that if a unified defense is presented, it is either all four in or all four out.

Mr. Landis: Yes, sir.

The Court: It won't be half way, or it may not be. There will be serious questions if the attorney is able to get one or two out and not all four, if it is

[51]

one attorney.

You have the benefit of the one attorney—I am not sure you would at that point—but still have the benefit of separate counsel if all four of you had separate attorneys.

But, it is—in your own words, you want to do this because you are very satisfied with Sprague and his office.

Mr. Landis: Yes, sir, I am.

The Court: Thank you very much.

Mr. Landis: You are welcome.

The Court: Thomas McNamee.

I invite you to make the same statement, Mr. McNamee.

Mr. McNamee: Thank you, Your Honor.

Your Honor, rather than rehash everything the other members of the team have said, I would just like to let it be known that we were in fact a team: Four different individuals, four different personalities, but a team. What we did on the street we did as a team. We are coming to court as a team. That is all I want to say.

The Court: And, what you are saying in effect is, that even if your role was much less culpable than the role of other members of the team, you are willing

[52]

to share team guilt.

Mr. McNamee: Sir, we work as a team on the street, we worked as four individuals as one body. That's——

The Court: Well, still, it is possible for parts of a team to be operating, each doing his own individual job, and it is possible for one to have been doing it in a fashion that wouldn't violate anybody's rights, and for somebody else to be doing something that did.

Mr. McNamee: No, sir. It is my belief that everyone on the team performed in a manner they were supposed to perform.

The Court: All right. Thank you.

(At this time the courtroom was opened to all parties. Mr. Weaver, Mr. Schenck, and spectators returned to the courtroom.)

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[53]

(The following colloquy took place in open court:)

The Court: All right. I will make my statements.

It appears to me quite apparent that a conflict of interest is likely to arise in the course of these proceedings.

It is equally apparent that each of these defendants is fully and completely aware of the potential for conflict of interest, and that each, without financial pressure, has made the decision to waive any claim of conflict of interest, and is doing so intelligently and voluntarily, and to be represented by one counsel.

This does not end the inquiry. I am not satisfied at this moment that in light of my perception that the conflict of interest is very likely to arise in this case, that I can nevertheless accept the waiver of these defendants.

I will ask both counsel to brief that point a bit more thoroughly before I make the decision.

If I decide that notwithstanding the waiver of these defendants that I cannot accept it in light of the likelihood of conflict, it is my intention to appoint separate counsel, and my suggestion that an immediate appeal be taken,

[54]

because the trial should not proceed if the defendants are proceeding in a fashion contrary to their desires. So, will you address yourselves as quickly as you can to that one issue.

It is regrettable that this situation has arisen, because I have a stack of motions on my desk that I am prepared to deal with. But, I cannot until the role of counsel has been clarified.

I will ask that counsel submit these memoranda within one week, and I will try to deal with it promptly thereafter.

I have made my findings concerning the conflict very likely to arise and the waiver. So, you start with those as my findings, and then you will make your argument from there in your briefs, and you will present your briefs simultaneously. I don't think it is necessary to respond to each other's briefs. You just give me all the law you can come up with as to whether I nevertheless am obligated under the circumstances in view of my perception that the conflict is a very likely one, whether I should accept the waiver or nevertheless proceed to appoint separate counsel.

Mr. Thall: Of course, Your Honor.

Mr. Weaver: Yes.

The Court: There is one further thought

[55]

that should be explored.

If I do decide that separate counsel are required, does this require that present counsel be eliminated from the case altogether? I think that was the situation in Dolan, if I am not mistaken. But, I leave it open. I want counsel to brief all of those points, because I want to understand the full implications of whatever decision I make and then we will proceed from there.

This hearing is adjourned.

A word of explanation to the press. I will simply point out that under the Rule an opportunity is to be given to defendants to make a statement in their own words that might otherwise appear prejudicial. And that is why we cannot have the Government here, and if I can't have the Government here I certainly don't want to have the press passing on to the Government what was said by the defendants.

Mr. Thall: Thank you, Your Honor.

(Court adjourned at 12:15 p.m.)

Reported by:
David S. Ehrlich, CSR

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CLERK

No. 82-374

IN THE

Supreme Court of the United States

October Term, 1982

ROBERT FLANAGAN, et al.,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

RICHARD A. SPRAGUE
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PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1982
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INDEX

	Page
Chronological List of Relevant Docket Entries	A1
Indictment, Dated September 10, 1981	A4
Defendants Keweshan, Landis, and McNamee's Motion for Severance From Co-Defendant Flanagan (Pages 1-4) ..	A15
Memorandum of Law in Support of Defendants' Motion for Severance of Defendants and Offenses Pursuant to Fed. R. Crim. P., Rule 14 (Pages 1-2)	A19

The following Opinions, Orders, and Transcript of Proceedings have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the printed Petition for Certiorari:

Panel Opinion of the United States Court of Appeals for the Third Circuit entered June 2, 1982 ..... A2

Opinion of the United States District Court for the Eastern District of Pennsylvania dated December 2, 1981 ..... A12

Order of the United States District Court for the Eastern District of Pennsylvania dated December 2, 1981 .. A29

Order of the United States District Court for the Eastern District of Pennsylvania dated December 4, 1981 .. A30

Judgment Order of the United States Court of Appeals for the Third Circuit entered June 2, 1982 ..... A32

Order Denying Rehearing of the United States Court of Appeals for the Third Circuit entered July 12, 1982 A34

Transcript of Rule 44(c) Proceedings held before the United States District Court for the Eastern District of Pennsylvania on November 12, 1981 ..... A36

Discussion A36

Robert Flanagan A46

James Keweshan A51

Sidney Landis A56

Thomas McNamee A61

Discussion A66

All references in Petitioner's Brief to the above items reprinted in the Appendix to the Petition for Certiorari will be noted as "PA —."

IN THE

Supreme Court of the United States

October Term, 1982

No. 82-374

ROBERT FLANAGAN, ET AL.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Sept. 10, 1981—True Bill.

Sept. 13, 1981—Defendants' Motion for Severance of the Conspiracy Count From the Substantive Count, Memorandum of Law in Support, Certificate of Service filed.

Oct. 20, 1981—Motion of Government for a Hearing and to Prohibit Multiple Representation and Memo filed.

Oct. 20, 1981—Government's Response to Motion of Defendant Keweshan, et al. for Severance from Defendant Flanagan, and Motion of all Defendants for Severance of Counts and Memo filed.

Oct. 29, 1981—Defendants' Answer to Government's Motion for a Hearing and to Prohibit Multiple Representation, New Matter and Memo filed.

Nov. 12, 1981—Argued sur: Government's Motion for Hearing and to Prohibit Multiple Representations-Defendants and Government Directed to Brief Issue of Whether Court Should Order Separate Representation filed.

Nov. 19, 1981—Defendants' Memorandum of Law on Issues Related to the Appointment of Individual Counsel by the Court filed.

Nov. 19, 1981—Government's Supplemental Memorandum in Support of its Motion for Disqualification of Counsel filed.

Nov. 23, 1981—Defendants' Reply on Issues Related to Appointment of Individual Counsel filed.

Dec. 2, 1981—Transcript of 11/12/81 filed.

Dec. 2, 1981—Opinion, Luongo, J. Sur Government's Motion to Prohibit the Law Firm of Sprague & Rubenstone From Representing All Four Defendants filed.

Dec. 2, 1981—Order Granting Motion of Government to Prohibit Multiple Representation of Defendants and Firm of Sprague & Rubenstone is Disqualified From Representing any of Defendants; That Each Defendant Shall Within 20 Days Cause Substitute Counsel of His Choice; That a Stay is Granted Pending Disposition of Appeal filed.

Dec. 3, 1981—Motion of Defendants for Reconsideration and/or Clarification and Memo filed.

Dec. 4, 1981—Order Granting Defendants' Motion for Clarification of Court's Opinion and Order Filed December 2, 1981 filed.

Dec. 8, 1981—Defendants' Notice of Appeal filed.

Dec. 8, 1981—Copy of Clerk's Notice to U.S. Court of Appeals filed.

Apr. 6, 1982—Motion by Amicus Curiae, Nat'l Assoc. of Crim. Defense Lawyers, Inc., et al. for Leave to File Brief Amicus Curiae, w/serv. filed.

Apr. 13, 1982—Submitted on above Mot. Coram: Gibbons & Hunter, C.J. & Thompson, D.J.

May 4, 1982—Order (Gibbons & Hunter, C.J. & Thompson, D.J.) Granting above Mot. filed.

May 11, 1982—Argument Before Gibbons & Hunter, C.J. & Thompson, D.J., Sitting by Designation.

June 2, 1982—Opinion and Judgment of Court of Appeals for Third Circuit, Affirming Judgment of District Court, Gibbons, J., filed.

June 15, 1982—Petition by Appellants for Rehearing, in banc, filed.

July 12, 1982—Order Denying Petition for Rehearing in banc, Gibbons, J., filed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 81-00270

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN
JAMES KEWESHAN
SIDNEY LANDIS
THOMAS McNAMEE

INDICTMENT

DATE FILED: 9/10/81

VIOLATIONS: 18 U.S.C. § 241 (Conspiracy Against Rights of Citizens—One Count)
18 U.S.C. § 242 (Deprivation of Rights Under Color of Law—Twelve Counts)

COUNT ONE

THE GRAND JURY CHARGES:

1. That from in or about September, 1979, to in or about February, 1981, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS McNAMEE, police officers of the City of Philadelphia, did knowingly, wilfully and intentionally conspire, combine, confederate and

agree together, and with others known to the grand jury, to injure, oppress, threaten and intimidate citizens of the United States in the free exercise and enjoyment of the rights secured to them by the Constitution and laws of the United States, to wit: not to be deprived of liberty without due process of law.

2. It was a part of the plan and purpose of the conspiracy that the defendants would, and did, under color of law, arrest various citizens without probable cause.

3. It was further a part of the plan and purpose of the conspiracy that the defendants would, and did, threaten, harrass, intimidate and assault these citizens after they were placed under arrest.

4. It was further a part of the plan and purpose of the conspiracy that the defendants would, and did, falsely accuse various citizens of criminal offenses under the Crimes Code of the Commonwealth of Pennsylvania, which offenses included, but were not limited to, robbery, theft, receiving stolen property and assault.

5. It was further a part of the plan and purpose of the conspiracy that the defendants would, and did, give false testimony during court proceedings in the courts of the Commonwealth of Pennsylvania in order to cause these citizens to be found guilty of crimes which they had not committed.

6. It was further a part of the plan and purpose of the conspiracy that the defendants would, and did, misrepresent and conceal the purposes, and acts done in furtherance, of the conspiracy.

Overt Acts

In furtherance of the conspiracy, the following overt acts, among others, were performed within the Eastern District of Pennsylvania:

1. On or about September 28, 1979, ROBERT FLANAGAN, JAMES KEWESHAN and THOMAS MCNAMEE did arrest and cause the arrests of Leslie Walker and Wayne Howard.

2. On or about September 26, 1979, ROBERT FLANAGAN did give an oral statement to Detective Joseph Falcone of the Philadelphia Police Department concerning the arrest of Leslie Walker and Wayne Howard.

3. On or about September 26, 1979, THOMAS MCNAMEE did give an oral statement to Detective Joseph Falcone of the Philadelphia Police Department concerning the arrest of Leslie Walker and Wayne Howard.

4. On or about October 31, 1979, ROBERT FLANAGAN testified at the preliminary hearing of Leslie Walker and Wayne Howard.

5. On or about November 10, 1979, ROBERT FLANAGAN testified in the prosecution of Leslie Walker and Wayne Howard.

6. On or about November 14, 1979, THOMAS MCNAMEE testified in the prosecution of Leslie Walker and Wayne Howard.

7. On or about December 18, 1979, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE did arrest and cause the arrests of Tracy Woodrit and Vance Young.

8. On or about December 18, 1979, ROBERT FLANAGAN did give an oral statement to Detective Anthony Scalzo of the Philadelphia Police Department concerning the arrests of Tracy Woodrit and Vance Young.

9. On or about December 18, 1979, SIDNEY LANDIS did order a Philadelphia Police dog to attack Tracy Woodrit.

10. On or about December 18, 1979, JAMES KEWESHAN, THOMAS MCNAMEE and SIDNEY LANDIS did intimidate, threaten, assault, beat and physically abuse Vance Young.

11. On or about December 18, 1979, SIDNEY LANDIS gave an oral statement to Detective Anthony Scalzo concerning the arrests of Tracy Woodrit and Vance Young.

12. On or about May 19, 1980, ROBERT FLANAGAN, SIDNEY LANDIS, and THOMAS MCNAMEE did arrest and cause the arrest of Ronald Ford.

13. On or about May 19, 1980, ROBERT FLANAGAN, SIDNEY LANDIS and THOMAS MCNAMEE did arrest and cause the arrest of Ronald Tooles.

14. On or about May 19, 1980, ROBERT FLANAGAN did give an oral statement to Detective Martin Connors concerning the arrest of Ronald Ford.

15. On or about May 19, 1980, ROBERT FLANAGAN did give an oral statement to Detective Martin Connors concerning the arrest of Ronald Tooles.

16. On or about May 19, 1980, SIDNEY LANDIS did cause a Philadelphia Police dog to attack Ronald Tooles.

17. On or about June 9, 1980, ROBERT FLANAGAN did testify at the preliminary hearing of Ronald Ford and Ronald Tooles.

18. On or about June 9, 1980, THOMAS MCNAMEE did testify at the preliminary hearing of Ronald Ford and Ronald Tooles.

19. On or about June 9, 1980, SIDNEY LANDIS did testify at the preliminary hearing of Ronald Ford and Ronald Tooles.

20. On or about November 3, 1980, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE did arrest and cause the arrest of Arthur Adams.

21. On or about November 3, 1980, ROBERT FLANAGAN did give an oral statement to Detective Robert Sobolusky of the Philadelphia Police Department concerning the arrest of Arthur Adams.

22. On or about November 3, 1980, THOMAS MCNAMEE did give an oral statement to Detective Robert Sobolusky of the Philadelphia Police Department concerning the arrest of Arthur Adams.

23. On or about November 3, 1980, SIDNEY LANDIS did give an oral statement to Detective Robert Sobolusky of the Philadelphia Police Department concerning the arrest of Arthur Adams.

24. On or about November 3, 1980, JAMES KEWESHAN did give an oral statement to Detective Robert Sobolusky of the Philadelphia Police Department concerning the arrest of Arthur Adams.

25. On or about January 6, 1981, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS and THOMAS MCNAMEE did arrest and cause the arrest of Douglas Bibbs.

26. On or about January 6, 1981, JAMES KEWESHAN and THOMAS MCNAMEE did intimidate, assault and physically abuse the person of Douglas Bibbs.

27. On or about January 6, 1981, ROBERT FLANAGAN did give an oral statement to Detective Anthony Scalzo of the Philadelphia Police Department concerning the arrest of Douglas Bibbs.

28. On or about January 6, 1981, JAMES KEWESHAN did give an oral statement to Detective Anthony Scalzo of the Philadelphia Police Department concerning the arrest of Douglas Bibbs.

29. On or about January 6, 1981, SIDNEY LANDIS did give an oral statement to Detective Anthony Scalzo of the Philadelphia Police Department concerning the arrest of Douglas Bibbs.

30. On or about January 6, 1981, THOMAS MCNAMEE did give an oral statement to Detective Anthony Scalzo of the Philadelphia Police Department concerning the arrest of Douglas Bibbs.

All in violation of Title 18, United States Code, Section 241.

COUNT TWO

THE GRAND JURY FURTHER CHARGES:

That on or about September 27, 1979, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Leslie Walker, an inhabitant of the Commonwealth of Pennsylvania, without probable cause, and thereby did wilfully deprive Leslie Walker of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT THREE

THE GRAND JURY FURTHER CHARGES:

That on or about September 27, 1979, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Wayne Howard, an inhabitant of the Commonwealth of Pennsylvania, without probable

cause, and thereby did wilfully deprive Wayne Howard of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT FOUR

THE GRAND JURY FURTHER CHARGES:

That on or about December 18, 1979, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Tracey Woodrit, an inhabitant of the Commonwealth of Pennsylvania, without probable cause, and thereby did wilfully deprive Tracey Woodrit of her right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT FIVE

THE GRAND JURY FURTHER CHARGES:

That on or about December 18, 1979, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Vance Young, an inhabitant of the Commonwealth of Pennsylvania, without probable cause, and thereby did wilfully deprive Vance Young of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT SIX

THE GRAND JURY FURTHER CHARGES:

That on or about December 18, 1979, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully intimidate, assault and physically abuse the person of Tracey Woodrit, an inhabitant of the Commonwealth of Pennsylvania, without just cause, and thereby did wilfully deprive Tracey Woodrit of her right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES:

That on or about December 18, 1979, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully intimidate, threaten, assault, beat and physically abuse the person of Vance Young, an inhabitant of the Commonwealth of Pennsylvania, without just cause, and thereby did wilfully deprive Vance Young of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES:

That on or about May 19, 1980, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN,

SIDNEY LANDIS, and ROBERT MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Ronald Ford, an inhabitant of the Commonwealth of Pennsylvania, without probable cause, and thereby did wilfully deprive Ronald Ford of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT NINE

THE GRAND JURY FURTHER CHARGES:

That on or about May 19, 1980, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, SIDNEY LANDIS, and ROBERT MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Ronald Tooles, an inhabitant of the State of New Jersey, without probable cause, and thereby did wilfully deprive Ronald Tooles of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT TEN

THE GRAND JURY FURTHER CHARGES:

That on or about May 19, 1980, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, SIDNEY LANDIS, and ROBERT MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully intimidate, assault and physically abuse the person of Ronald Tooles, an inhabitant of the State of New Jersey, without just cause, and thereby did wilfully deprive Ronald Tooles of his right, secured and

protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES:

That on or about November 3, 1980, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Arthur Adams, an inhabitant of the Commonwealth of Pennsylvania, without probable cause, and thereby did wilfully deprive Arthur Adams of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES:

That on or about January 6, 1981, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Douglas Bibbs, an inhabitant of the Commonwealth of Pennsylvania, without probable cause, and thereby did wilfully deprive Douglas Bibbs of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT THIRTEEN

THE GRAND JURY FURTHER CHARGES:

That on or about January 6, 1981, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully intimidate, assault and physically abuse the person of Douglas Bibbs, an inhabitant of the Commonwealth of Pennsylvania, without just cause, and thereby did wilfully deprive Douglas Bibbs of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

A TRUE BILL:

_____

FOREMAN

_____

PETER F. VAIRA
United States Attorney

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-00270

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN;
JAMES KEWESHAN;
SIDNEY LANDIS; and
THOMAS McNAMEE

DEFENDANTS KEWESHAN, LANDIS AND McNAMEE'S MOTION FOR SEVERANCE FROM CO-DEFENDANT FLANAGAN AND THE ABOVE-NAMED DEFENDANTS JOINED BY CO-DEFENDANT FLANAGAN'S MOTION FOR SEVERANCE OF THE CONSPIRACY COUNT FROM THE SUBSTANTIVE COUNT

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DEFENDANTS KEWESHAN, LANDIS AND McNAMEE'S MOTION FOR SEVERANCE FROM CO-DEFENDANT FLANAGAN AND THE ABOVE-NAMED DEFENDANTS JOINED BY CO-DEFENDANT FLANAGAN'S MOTION FOR SEVERANCE OF THE CONSPIRACY COUNT FROM THE SUBSTANTIVE COUNT

COMES Now, Defendants James Keweshan, Sidney Landis, and Thomas McNamee, by and through their Attorneys, Richard A. Sprague, Bruce L. Thall and James Patrick Leonard, and respectfully move, pursuant to Rule 14 of the Fed. R. Crim. P., that this Honorable Court enter an Order severing this trial from that of Co-Defendant Robert Flanagan and, further, the above-named Defendants, joined herein by co-Defendant Robert Flanagan, respectfully move for the entry of an Order by this Honorable Court severing the trial on the alleged violation of 18 U. S. C. § 241 from that on the alleged violation of 18 U. S. C. § 242 and 2. In support of their motions, the Defendants aver as follows:

A. Severance of James Keweshan, Sidney Landis and Thomas McNamee for the Trial of Co-Defendant Robert Flanagan.

(1) Defendants Keweshan, Landis and McNamee are employed as Police Officers and their duty, during the period of time with which this indictment is concerned, was to serve as backup members of co-Defendant Flanagan's Grand-Pop Decoy Team.

(2) Defendants Keweshan, Landis and McNamee, in the performance of this duty would remain hidden while co-Defendant Robert Flanagan, posing as an aged derelict, was confronted and robbed of his money by nu-

merous individuals. Only after the criminals had taken his money and co-Defendant Robert Flanagan gave a standard alarm, "Give me back my money," did the backup officer come on the scene.

(3) Defendants Keweshan, Landis, and McNamee aver that the present Indictment, stripped to the core, discloses that all alleged violations of 18 U. S. C. 241, 242 and 2 are by necessity based upon one of several arrests in which certain of them, in the performance of their duty, and only in response to their team leaders signal, acted to take a suspect into custody, reported their knowledge of this act to their superiors, and, in response to Subpoenas, gave testimony as to their participation in these arrests in various courts of law.

(4) Defendants Keweshan, Landis, and McNamee aver that (a) since their participation in each arrest underlying this Indictment was predicated on their receipt of a prearranged signal from co-Defendant Flanagan; (b) further, that from their places of hiding, they were not privileged to the details of what, in fact, occurred between co-Defendant Flanagan and the various persons who robbed him; and (c) each of the overt acts and acts included in substantive counts, related to certain of them in their individual capacity, is, standing alone, a legal act, and, in fact, was required either by circumstance or law.

(5) Defendants Keweshan, Landis and McNamee aver that in consideration of all the foregoing reasons, the Government's case, by necessity, will be dependent on facts and circumstances of which they have little or no knowledge, but, rather, the vast majority of the Government's evidence will be related to what transpired between co-Defendant Flanagan and the various individuals who robbed him.

(6) Defendants Keweshan, Landis and McNamee aver that under the facts as set forth in (1) through (5) above, it would be error for this Honorable Court to force them to participate in a joint trial with co-Defendant Flanagan, where, by necessity, they will suffer severe prejudice from evidence, if any, offered against Officer Flanagan.

WHEREFORE, Defendants Keweshan, Landis and McNamee respectfully move this Honorable Court to Order a separate trial for them under Criminal No. 81-00270.

B. Severance of Conspiracy Count

(1) Defendants Keweshan, Landis and McNamee, joined herein by Defendant Robert Flanagan, aver that the conspiracy to violate 18 U. S. C. 241 alleged at Criminal No. 81-00270 as having begun on or about September, 1979, and continued to on or about February, 1981, is far broader in

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-00270

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN;
JAMES KEWESHAN;
SIDNEY LANDIS; and
THOMAS McNAMEE

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SEVERANCE OF DEFENDANTS AND OFFENSES PURSUANT TO FED. R. CRIM. P., RULE 14

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SEVERANCE OF DEFENDANTS AND OFFENSES PURSUANT TO FED. R. CRIM. P., RULE 14

A. Severance of the Trial of Robert Flanagan From the Trial of Keweshan, Landis and McNamee

This Motion is predicated on Fed. R. Crim. P., Rule 14. Rule 14 of the Fed. R. Crim. P. states, in relevant part:

> 'If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires . . ."

As is stated in 8 Moore's Federal Practice, ¶ 14.04[4] (Cipes Ed. 1981), wherein Rule 14 was discussed, "Severance may be required to protect a defendant from a "spill-over" of evidence where there is a gross disparity in the quantum of evidence as between the two defendants." See *United States v. Grambrill*, 449 F. 2d 1148 (D. C. Cir. 1971).

In *United States v. Kelly*, 349 F. 2d 720 (2d Cir. 1965), *cert. denied*, 384 U. S. 947 (1966), the Second Circuit reversed the judgment of conviction against one co-Defendant, stating that the safeguard of severance should have been used to protect the co-Defendant "the moment it appeared that he was likely to be prejudiced by the accumulation of evidence of wrongdoing by his co-Defendants." 349 F. 2d at 756. The circumstances underlying the present Indictment are such that Defendants Keweshan, Landis and McNamee strongly urge upon this Court

that "the moment" when prejudice is likely to occur if they are forced to trial along with co-Defendant Flanagan is now. Therefore, on the basis of the facts averred in the attached Motion, which clearly indicate that the Government's case will be one in which there is a "gross disparity in the quantum of evidence" as between themselves and co-Defendant Robert Flanagan, and any negative inference that the jury may draw therefrom will be prejudicially spilled over onto them, a severance must be granted.

The basis of this Motion is the knowledge on the part of Keweshan, Landis and McNamee that by necessity, the Government's case must focus on Robert Flanagan, rather than any belief that co-Defendant Flanagan was involved in any wrongdoing or that the Government will produce evidence of wrongdoing against him.

Office-Supreme Court, U.S.
FILED
NOV 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-374

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT FLANAGAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court abused its discretion when it disqualified a single law firm from representing all four petitioners.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Discussion 7

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 8

Cuyler v. *Sullivan*, 446 U.S. 335 10

Faretta v. *California*, 422 U.S. 806 11

Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 8

Nixon v. *Fitzgerald*, No. 79-1739 (June 24, 1982) 8

Powell v. *Alabama*, 287 U.S. 45 ..... 9, 11

Singer v. *United States*, 380 U.S. 24 11

United States v. *Agosto*, 675 F.2d 965, cert. denied after remand and subsequent affirmance sub nom. *Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982) 8, 12

United States v. *Armedo-Sarmiento*, 524 F.2d 591 12

United States v. *Cunningham*, 672 F.2d 1064 ..... 8, 12

United States v. *Curcio*, 680 F.2d 881 ..... 11, 12

Page

Cases—Continued:

United States v. *Dolan*, 570 F.2d 1177 5

United States v. *Garcia*, 517 F.2d 272 12

United States v. *Greger*, 657 F.2d 1109, petition for cert. pending, No. 81-1357 8

United States v. *Hobson*, 672 F.2d 825, cert. denied, No. 82-57 (Oct. 12, 1982) 8

United States v. *Smith*, 653 F.2d 126 8

Constitution, statutes and rules:

United States Constitution:

Fifth Amendment (Due Process Clause) 5

Sixth Amendment 5, 7, 9, 10, 11

18 U.S.C. 241 2

18 U.S.C. 242 2

28 U.S.C. 1291 7

Fed. R. Crim. P. 44(c) 5, 6, 12

E.D. Pa. R. 7 9

Miscellaneous:

Model Code of Professional Responsibility (1980):

DR 5-105 ..... 5, 10
DR 5-105(C) 10

Standards Relating to the Prosecution and the Defense Function (App. Draft 1971):

§ 3.5 5
§ 3.5(b) 10

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-374

ROBERT FLANAGAN, ET AL., PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A11) is reported at 679 F.2d 1072.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1982 (Pet. App. A32-A33), and a petition for rehearing was denied on July 12, 1982 (Pet. App. A34-A35). The petition for a writ of certiorari was filed on September 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are police officers in the Philadelphia Police Department, where they were members of a so-called "grandpop" squad. The squad focused on apprehending street criminals using petitioner Flanagan, disguised to

appear infirm or aged, as a decoy. The other three petitioners served as a back-up team that responded upon hearing a prearranged signal from petitioner Flanagan (Pet. App. A13).

On September 10, 1981, a grand jury sitting in the Eastern District of Pennsylvania indicted petitioners in a 13-count indictment. The indictment charged all petitioners in Count 1 with conspiring to violate the civil rights of citizens, in violation of 18 U.S.C. 241. The succeeding counts charged petitioners, in varying combinations, with substantive civil rights offenses in violation of 18 U.S.C. 242 (Pet. App. A4). The indictment alleged that in the course of their activities on the grandpop squad, petitioners had conspired to arrest persons without probable cause and had illegally arrested or physically abused eight people (Pet. App. A13).

2. During the grand jury's investigation, petitioners had retained the firm of Sprague & Rubenstone to represent them (Pet. App. A4). On October 20, 1981, after the indictment was returned, the government moved under Fed. R. Crim. P. 44(c) for a hearing to inquire into the joint representation of all four petitioners by one law firm.

After the hearing and submission of briefs, the district court ordered the law firm of Sprague and Rubenstone disqualified from representing any of the petitioners. The court found that "a conflict of interest was very likely to arise in the course of the proceedings against [petitioners]," observing that to reach this conclusion "one need not look beyond the indictment and the numerous pretrial motions, together with supporting memoranda of law, filed by defense counsel" (Pet App. A16).[1]

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[1]Similarly, the court stated at the hearing (Pet. App. A40): "The potential for conflict just jumps out in this case and I just don't know how counsel could even undertake, under the circumstances, to attempt to represent all four of these defendants." See also *id.* at A55, A59, A68.

The court first noted that all four petitioners were not charged in each count of the indictment,[2] reflecting that the involvement of each "may vary significantly from that of the others" (Pet. App. A16-A17). Indeed, the court observed, petitioners had moved to dismiss Count One of the indictment, the conspiracy count, arguing that because of the differences in each petitioner's role in the particular arrests, there was no single conspiracy and that each allegedly illegal arrest must have been the product of a separate agreement (*id.* at A17-A18).

In addition, the court noted that defense counsel had acknowledged this to be a complex case that is likely to turn on circumstantial evidence relating to each petitioner's state of mind and that petitioners recognized that oral statements made by them will be essential to prove the requisite state of mind of each. Accordingly, the court reasoned, "[t]he potential for conflict here is overwhelming since joint counsel's obligation to preserve the confidences of one defendant could severely hamper the cross-examination of any hearsay witness as to another defendant" (Pet. App. A18).

The court found, however, that "[t]he most glaring evidence of the potential for conflict which may arise if all defendants are represented jointly is found in defendants Keweshan, Landis and McNamee's motion for severance, and the accompanying memorandum of law" (Pet. App. A18). There, the court noted, these three petitioners had argued that they would be "severely prejudiced" if they were tried together with petitioner Flanagan (*id.* at A19). In support of this motion, they argued that their participation was predicated on receipt of the prearranged signal from Flanagan, the decoy; that from their places of hiding they were not knowledgeable of the details of what occurred

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[2]Petitioners Flanagan and McNamee were charged in all 13 counts, Landis in 11 counts, and Keweshan in 10 counts (Pet. App. A12-A13).

between Flanagan and those who robbed him; that each of the overt acts and acts in the substantive counts relating to them individually was, standing alone, legal and required by the circumstances; that "the vast majority of the Government's evidence will be related to what transpired between [petitioner] Flanagan and the various individuals who robbed him"; and that the government's case will therefore "be dependent on facts and circumstances of which they have little or no knowledge" (Pet. App. A19 n.2).[3]

The district court concluded on the basis of testimony at the hearing that each petitioner was fully aware of the potential conflicts and that each, without financial pressure, had voluntarily and intelligently chosen to waive any objection to the conflict of interest and elected to be represented by the same counsel (Pet. App. A16). However, the court expressed "grave concern" that a conflict of interest was very likely to arise (Pet. App A25), and concluded that it had the authority to require separate counsel under these circumstances notwithstanding petitioners' waiver of their right to separate counsel.

The court noted that the ethical standards of the legal profession prohibit multiple representation unless it is "obvious" or "clear" that the lawyer can adequately represent the interests of each client, even if each consents to such

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[3]The district court also discussed other ways in which a conflict of interest could manifest itself in the case, as summarized by defense counsel himself: (1) the inability of counsel to set one defendant apart from the others during opening and closing statements; (2) the inability of counsel to argue the relative culpability of the defendants at sentencing; (3) the possibility of an offer of immunity to one of the defendants; (4) the likelihood that the government would introduce more evidence against petitioner Flanagan, perhaps leading the jury to infer guilt of the others or causing defense efforts to concentrate on Flanagan; and (5) problems arising if some but not all of the petitioners chose to testify or if character or reputation evidence was offered on behalf of some but not all petitioners (Pet. App. A14-A15).

representation (Pet. App. A23-A24, A26, quoting Model *Code of Professional Responsibility*, DR 5-105 (1980), and *Standards Relating to the Prosecution and the Defense Function* § 3.5 (Approved draft 1971)). The district court stressed as well that an attorney's representation of conflicting interests "invites disrespect for the integrity of the court" and is "detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court" (*id.* at A24, quoting *United States* v. *Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978)). Finally, the court rejected petitioners' argument that disqualification would be appropriate only upon a showing of an "actual" conflict of interest, observing that, under Fed. R. Crim. P. 44(c), it was required to take appropriate action in advance of trial based on the likelihood that an actual conflict would develop (Pet. App. A25). The court agreed that disqualification of a defendant's chosen counsel would be inappropriate if the potential for a conflict of interest were "mere speculation," but concluded that "where the likelihood is great that a potential conflict will escalate into an actual conflict," it had the discretion to anticipate the conflict and disqualify defense counsel (Pet. App. A27).

3. The court of appeals affirmed the district court's order, finding no abuse of discretion in the disqualification of the law firm (Pet. App. A1-A11). The court noted in this regard that petitioner did not dispute the district court's finding that the conflicts of interest it identified were very likely to arise (*id.* at A10; see also *id.* at A6).

In affirming the district court's order, the court reasoned that although the Sixth Amendment and the Due Process Clause do provide some protection for a defendant's decision to select a particular attorney, "that protection goes no further than preventing arbitrary dismissal of the chosen attorney, and providing a fair opportunity to secure counsel

of his choice" (*id.* at A8). The court of appeals therefore held that a court may order the disqualification of counsel in conformity with the ethical standards of the bar even over the defendant's objections. In the court's view, although a knowing and intelligent waiver accepted by the court will insulate a conviction from later attack, "[i]t does not follow * * * that because defendants may waive their right to separate representation free from potential conflicts, they have an absolute right, constitutional or otherwise, to have such waivers accepted by a court" (*id.* at A9).

The court of appeals stressed that a defendant's choice of counsel is not to be dealt with lightly or arbitrarily or interfered with where potential conflicts of interest are speculative. But where materialization of a conflict is very likely, the court held that disqualification of joint counsel and the ordering of separate counsel is one of the appropriate measures a district court may take under Fed. R. Crim. P. 44(c) when it is unable to conclude that a conflict of interest is not likely to result from joint representation.[4] "Once each defendant has consulted with his own counsel," the court explained, "a truly independent decision may then be made whether or not to continue with a common defense strategy in light of the hazards that such a strategy may entail" (Pet. App. A10; footnote omitted).

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[4]The court also rejected petitioners' contention that even if joint representation is inappropriate in this case, the law firm should not have been disqualified from representing any of the petitioners. In the court's view, the potential for a conflict of interest arising from the firm's receipt of confidential information from all defendants was obvious. Thus, the court concluded that although complete disqualification may not be required in every case where a conflict of interest is likely to arise, that is one measure committed to the discretion of the trial court under Fed. R. Crim. P. 44(c), and there was no abuse of discretion here (Pet. App. A11).

The court of appeals stayed its mandate to and including September 19, 1982, to permit the filing of a petition for a writ of certiorari, and we have been informed by the United States Attorney that a trial date has not yet been set, apparently pending the Court's disposition of the petition.

DISCUSSION

Petitioners contend that, notwithstanding the district court's explicit and supported finding that the law firm representing them is very likely to be confronted with a conflict of interest at trial, the Constitution prohibited the district court from disqualifying the law firm in the exercise of its authority to supervise the conduct of attorneys appearing before it. This contention is in error. The Constitution does not afford the accused in a criminal prosecution the right to insist upon being represented by a lawyer whose appearance in the case would violate the established ethical standards of the legal profession, jeopardize the integrity of the criminal justice system, and undermine the public's confidence in that integrity. Nor would the result petitioners urge further the purposes of the Sixth Amendment of assuring that the accused has the assistance of counsel whose efforts will be devoted entirely to his interests, unhinderd by divided loyalties.

Nevertheless, because, as petitioners point out (Pet. 12-18), the decisions of several other courts of appeals conflict with that of the Third Circuit in this case regarding the authority of a trial court to disqualify counsel in these circumstances, we do not oppose the grant of the instant petition for a writ of certiorari.

1. A threshold question that will apparently require decision if the Court grants the petition in this case is whether the court of appeals had jurisdiction under 28 U.S.C. 1291 of petitioners' pretrial appeal of the order disqualifying

counsel. The question of the appealability of orders granting disqualification was reserved by this Court in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 372 n.8 (1981).

The court of appeals in this case held (Pet. App. A5 n. 1) that it did have jurisdiction. Several other courts of appeals have reached the same conclusion, in criminal cases, without extended discussion of the issues. See, e.g., *United States* v. *Cunningham*, 672 F.2d 1064, 1066 n.1 (2d Cir. 1982); *United States* v. *Agosto*, 675 F.2d 965, 968 n.1 (8th Cir.), cert. denied after remand and subsequent affirmance sub nom. *Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982); *United States* v. *Hobson*, 672 F.2d 825, 826 (11th Cir.), cert. denied, No. 82-57 (Oct. 12 1982); see also *United States* v. *Smith*, 653 F.2d 126 (4th Cir. 1981) (pretrial appeal entertained; question of appealability not discussed). The Ninth Circuit has reached the opposite conclusion. See *United States* v. *Greger*, 657 F.2d 1109 (1981), petition for cert. pending, No. 81-1357.

As we explain in our Brief in Opposition (at 10-14) to the certiorari petition in *Greger*,[5] there is a substantial question whether such an order satisfies the criteria of a collateral order appealable under the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny. See *Nixon* v. *Fitzgerald*, No. 79-1739 (June 24, 1982), slip op. 9-11. The circuit conflict on this issue independently warrants review by this Court. Because the trial in *Greger* was not stayed and already has been completed, this is a more appropriate case than *Greger* for consideration of the jurisdictional issue.

2. The principal thrust of petitioners' position on the merits of the disqualification issue is that they have a constitutional right to counsel of their choice that overrides the

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[5]We are furnishing counsel for petitioner with a copy of the Brief for the United States in Opposition in *Greger*.

authority of the district court to supervise the ethical conduct of attorneys appearing before it. They argue, in other words, that they have a constitutional right to waive their Sixth Amendment right to the effective assistance of counsel who is not burdened with a conflict of interest and that such a waiver is binding upon the courts. See Pet. 12-14, 18, 20-22. This contention misapprehends both the nature of the Sixth Amendment right to the assistance of counsel and the ability to waive that right.

a. As the court of appeals correctly oberved (Pet. App. A8), the Constitution does not afford absolute protection to a defendant's selection of a particular attorney to represent him; the constitutional protection "goes no further than preventing arbitrary dismissal of the chosen attorney, and providing a fair opportunity to secure counsel of his choice" (*ibid.*). This is clear from *Powell* v. *Alabama*, 287 U.S. 45 (1932), where the Court stated that if "a state or federal court were *arbitrarily* to refuse to hear a party by counsel, employed by and appearing for him," such a refusal "would be a denial of a hearing, and, therefore, of due process in the constitutional sense" (287 U.S. at 69; emphasis added). The Court did state that a defendant must be afforded a "fair opportunity" to secure counsel of his choice (*id.* at 53), but it did not suggest that the defendant has an absolute right to be represented by counsel of his choice.

The district court's disqualification of the law firm in this case plainly did not violate these principles. That court did not "arbitrarily" deprive petitioners of the assistance of counsel of their choice. The court rested its order of disqualification on the substantial countervailing public interest in ensuring the integrity of the bar and the administration of criminal justice that is served by preventing conflicts of interest in the representation of defendants in criminal trials. That interest finds expression in well established rules of the legal profession, which are in turn incorporated in the

local rules of the district court.[6] As the district court observed (Pet. App. A23-A24, A26), DR 5-105(C) of the *Model Code of Professional Responsibility* (1980) provides that a lawyer may not represent more than one client in a matter unless all consent and it is "obvious that he can adequately represent the interests of each." Similarly, § 3.5(b) of the *Standards Relating to the Prosecution Function and the Defense Function* (App. Draft 1971) states that "[t]he potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation." Thus, as this Court observed in *Cuyler* v. *Sullivan*, 446 U.S. 335, 346 (1980), citing DR 5-105 and Standard 3.5(b), "[d]efense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial."

The district court's finding — which was affirmed by the court of appeals (Pet. App. A10) and is not challenged by petitioners herein — that a conflict of interest would be "very likely" to arise if petitioners were represented by the same law firm, establishes that even though petitioners have consented to the joint representation, the attorneys in that firm would violate the provisions of DR 5-105 and Standard 3.5 if they represented petitioners in this case. Accordingly, the district court's application of well recognized ethical standards of the bar in disqualifying the law firm from representing petitioners cannot be thought to have

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[6]E.D. Pa. R. 7 provides: "The canons of ethics of the American Bar Association as now existing shall be and as hereafter modified shall become standards of conduct for attorneys of this Court."

arbitrarily interfered with petitioners' selection of counsel of their choice. Moreover, it cannot seriously be contended that elimination of the disqualified law firm from the pool of available counsel deprives petitioners of a constitutionally sufficient "fair opportunity to secure counsel of [their] own choice" (*Powell* v. *Alabama, supra,* 287 U.S. at 53) from among those who remain.

b. Petitioners also err in contending (Pet. 12-14, 21-22) that they have a constitutional right to waive their Sixth Amendment right to the assistance of conflict-free counsel and to be represented instead by an attorney who will be likely to be faced with a conflict of interest at trial. We may assume that petitioners' knowing and intelligent waivers of their Sixth Amendment right to the effective assistance of counsel in the face of a potential conflict of interest would insulate any ensuing conviction from later attack. But as the court of appeals observed, "[i]t does not follow * * * [that] they have an absolute right, constitutional or otherwise, to have such waivers accepted by a court" (Pet. App. A9). As this Court has stated, "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Faretta* v. *California,* 422 U.S. 806, 819 n.15 (1975), quoting *Singer* v. *United States,* 380 U.S. 24, 34-35 (1965). Applying that principle here, the ability of a defendant to waive his right to be represented by conflict-free counsel does not imply a right to insist upon the opposite of that right: representation by an attorney who has a conflict of interest.

3. Although, for the reasons given above, the decision of the court of appeals on the merits of the disqualification issue is correct, we do not oppose the grant of the petition in this case. As petitioners point out, the Second Circuit has recently held, in conflict with the decision below, that defendants who are to be jointly tried have a constitutional right to be represented by counsel who has a conflict of

interest, even where counsel's appearance in the case would violate the ethical standards of the bar. *United States* v. *Curcio*, 680 F.2d 881, 885-888 & n.3 (1982). In reaching this conclusion, however, the Second Circuit acknowledged its "serious misgivings" about the practice (680 F.2d at 886) and its "uneasiness about sanctioning the joint representation of criminal defendants" because of the "considerable dangers" of prejudical conflict of interest that are "both ubiquitous and insidious" (*id.* at 887). See also *United States* v. *Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975); cf. *United States* v. *Cunningham*, *supra*. The Fifth Circuit likewise has recognized a right of defendants to insist upon joint representation in such circumstances, *United States* v. *Garcia*, 517 F.2d 272 (1975), and the Eighth Circuit's decision in *United States* v. *Agosto*, *supra*, 675 F.2d at 973-974, likewise can be read to lend some support to this proposition. The Third Circuit in this case itself acknowledged (Pet. App. A9 n.5) that its holding conflicted with that of the Second and Fifth Circuits in *Armedo-Sarmiento* and *Garcia*, respectively.

In addition, the issue presented is one of substantial and recurring importance in the administration of criminal justice in the federal courts, and it may be expected to arise even more frequently now that district courts are required by Fed. R. Crim. P. 44(c) to conduct an inquiry in all cases of joint representation and to take "appropriate" measures if ~~it is~~ unable to conclude that no conflict of interest is likely to arise. Because of the conflict in the circuits, and especially in view of the threat to the integrity of the bar and the administration of criminal justice occasioned by joint representation in cases involving a serious potential for a conflict of interest, review by this Court is required in order to offer guidance on the question whether the Constitution nevertheless requires a trial court to permit joint representation in such circumstances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1982

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No. 82-374

IN THE

Supreme Court of the United States

October Term, 1982

ROBERT FLANAGAN,
JAMES KEWESHAN,
JOSEPH LANDIS,
THOMAS McNAMEE,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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195

TABLE OF CITATIONS

Cases:	Page
Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1949)	1
In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381 (S. D. N. Y. 1975)	3
United States v. Agosto, 675 F. 2d 965 (8th Cir.), *cert. denied* after remand and subsequent affirmance sub nom. Gustafson v. United States, No. 81-2270 (Oct. 4, 1982)	2
United States v. Armedo-Sarmiento, 524 F. 2d 591 (2d Cir. 1975)	2
United States v. Cunningham, 672 F. 2d 1064 (2d Cir. 1980)	2
United States v. Curcio, 680 F. 2d 881 (2d Cir. 1982)	2
United States v. Garcia, 517 F. 2d 272 (5th Cir. 1975)	2
United States v. Greger, 657 F. 2d 1109 (9th Cir. 1981), petition for cert. pending, no. 81-1357	1
Statutes:	
28 U. S. C. § 1291	1

PETITIONER'S REPLY BRIEF

In its Brief, the United States has affirmatively represented that "we do not oppose the grant of the instant petition for a writ of certiorari." (Gov. Brf. at 7). The government referred to two categories of issues, each of which it deemed so significant as to warrant the granting of the petition.

1. Although the court below held that it had jurisdiction over the appeals from the district court orders disqualifying counsel pursuant to 28 U. S. C. § 1291 and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) (Pet. App. A5 n. 1), and the government acknowledged that "other courts of appeals have reached the same conclusion, in criminal cases" (Gov. Brf. at 8), the government points to a conflict in the circuits based upon *United States v. Greger*, 657 F. 2d 1109 (9th Cir. 1981), petition for cert. pending, no. 81-1357.[1]

2. Obviously, since the Third Circuit held that it had jurisdiction over the merits of the appeal, petitioners did not raise this question in their Petition. Even though *Greger* is distinguishable because the instant case presents a judicially acknowledged waiver and no actual conflict of interest, petitioners agree with the government that "the circuit conflict on this issue independently warrants review by this Court." (Gov. Brf. at 8).

3. The second category of issues deemed so significant by the government as to warrant the granting of the Petition deals with the merits of the disqualification issue.

1. *Greger*, cited in the Petition for Certiorari, poses the question whether a pretrial disqualification of counsel in a criminal case who has an actual conflict of interest, absent a waiver or common defense, is a final appealable order.

The government acknowledges that the Third Circuit stands alone in holding that despite a valid waiver and an absence of an actual conflict of interest, nonetheless, disqualification of counsel chosen by defendants to present a common defense is permissible (Gov. Brf. at 11-12). Indeed, the government concedes that the holding below is flatly contradicted by *United States v. Curcio*, 680 F. 2d 881 (2d Cir. 1982); *United States v. Cunningham*, 672 F. 2d 1064 (2d Cir. 1980); *United States v. Armedo-Sarmiento*, 524 F. 2d 591 (2d Cir. 1975); *United States v. Garcia*, 517 F. 2d 272 (5th Cir. 1975); *United States v. Agosto*, 675 F. 2d 965 (8th Cir.), *cert. denied* after remand and subsequent affirmance sub nom. *Gustafson v. United States*, No. 81-2270 (Oct. 4, 1982).

Petitioners agree with the government that "review by this Court is required in order to offer guidance on the question" (Gov. Brf. at 12).

4. Petitioners, nonetheless, are compelled to further reply to the government's brief because it has misstated the factual underpinnings of the disqualification issue, especially regarding the absence of an actual conflict of interest and the spectre of potential conflicts attributable to joint representation.

5. Petitioners have continuously and studiously established that there is no conflict of interest (A41, A45). The government had never contended the contrary (A37). The trial court found no such conflict (A4-A6). The orders appealed from are based solely upon the trial court's assessment that a conflict of interest was likely to arise (A16, A4, A3).

6. After the trial court issued its Order precluding petitioners from retaining counsel of their choice, based on its belief that potential conflicts might rise to the level of actual conflicts, petitioners filed a Motion for Recon-

sideration and/or Clarification to assure that the basis for the court's order was clear. The Motion was granted, and the court clearly set forth the core predicate for its disqualification—"the presumption that privileged information has been acquired as a result of the attorney-client relationship." (A30). Indeed, both the panel and the district court articulated that the potential conflict causing them the most concern was that occasioned by counsel's acquisition of privileged information by dint of the lawyer/client relationship.

7. The major section of petitioners' appellate brief discussed the facts that whether petitioners are represented by one firm or separate firms:

> (a) any privileged information shared among counsel raises the self-same potential conflict; and
>
> (b) the price paid for sharing privileged information is the waiver of the attorney/client privilege respecting that information shuold be the common defense breakdown.[2]

It necessarily follows, therefore, that the panel opinion serves to preclude the presentation of a common defense because such defense necessarily hinges upon the complete sharing of privileged communications made to counsel, regardless of the number of firms representing co-defendants. Thus, while couched in terms of multiple representation, the panel opinion actually precludes the

2. This latter point was seemingly accepted by the panel which set forth in a footnote, "6. *See, e.g., In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381 (S. D. N. Y. 1975) (attorney-client privilege will not apply among joint defendants and their attorneys in later controversies between or among those clients, even though shared information may initially be insulated from exposure beyond confines of the group)." A10. The former point was not discussed by the panel.

presentation of a common defense, relying upon a procedural rule to abrogate the strategy constitutionally accepted by this Court.

8. It is this potential conflict, and only this potential conflict, which adheres to any criminal action in which the defendants choose to have a common defense presented by one law firm. The other potential conflicts discussed—opening and closing statements, sentencing, spillovers, possible grants of immunity, nature of the evidence, right to testify, character and reputation testimony (A14-A15, A42-A45)—are potential conflicts attributable solely to the determination by each petitioner to present a common defense. Regardless of whether one firm or four firms represent petitioners, these potential conflicts are present and to the same degree.

9. Thus, the government's assertion that: "the district court's finding—which was affirmed by the court of appeals (Pet. App. A10) and is not challenged by petitioners—that a conflict of interest would be 'very likely' to arise if petitioners were represented by the same law firm" (Gov. Brf. at 10) is somewhat misleading.

Petitioners have contended that a decision to present a common defense always raises the spectre of potential conflicts of interest. However, it is petitioners' position that this potential for conflict, unchallenged and undisputed, has no bearing whatsoever on the issue of joint or multiple representation.

10. Petitioners have strenuously and repeatedly contested the notion that a potential conflict of interest arising from "the presumption that privileged information has been acquired as a result of the attorney-client relationship" (A30) may serve to disqualify counsel from presenting a common defense for persons jointly represented.

To the extent that the government's brief may be read to suggest that this finding by the courts below is undisputed and unchallenged, such suggestion is erroneous.

11. Having clarified the record, petitioners agree with the government that this Court should issue a writ of certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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No. 82-374

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October Term, 1982

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Petitioner

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JAMES KEWESHAN,

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Respondent

JOSEPH LANDIS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

THOMAS McNAMEE,

Petitioner

v.

UNITED STATES OF AMERICA,

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PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1982
CERTIORARI GRANTED JANUARY 10, 1983

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QUESTIONS PRESENTED

1. Whether the panel of the Third Circuit Court of Appeals, in affirming the district court's disqualification of Petitioners' counsel, committed error and, in so doing, disregarded decisions of this Court, by denying Petitioners their constitutional right to counsel of their choice to present their common defense in this criminal case, based only on a spectre of potential conflicts of interest, and despite Petitioners' intelligent assertion of their right to counsel of choice at a Rule 44(c) proceeding?

2. Whether the panel of the Third Circuit Court of Appeals committed error in utilizing an incorrect standard of review of the trial court's order denying Petitioners the counsel of their choice to present their common defense in this criminal case, by promulgating a standard requiring affirmance of such a disqualification order unless there is good cause to believe that no conflict of interest is likely to arise or that the disqualification of counsel was an abuse of discretion, when, in fact, in the face of Petitioners' intelligent exercise of their right to counsel, a trial court must permit Petitioners to go to trial with counsel of their choice?

3. Whether the panel of the Third Circuit Court of Appeals committed error by concluding that Fed.R. Crim.P. 44(c), utilized alone or in conjunction with the trial court's supervisory powers, permits a court to deny Petitioners their constitutionally protected choice of retained counsel despite the fact that a valid waiver of potential conflicts of interest had been obtained?

4. Whether the panel opinion of the Third Circuit Court of Appeals destroys the constitutional rights of Petitioners to consult with and retain counsel of their choice?

5. Whether the panel opinion of the Third Circuit Court of Appeals absolutely precludes the presentation of a common defense by defendants jointly charged in a criminal case?

6. Whether the panel opinion of the Third Circuit Court of Appeals absolutely precludes representation by one attorney of multiple defendants in criminal cases, regardless of the facts and circumstances underlying each case?

7. Whether, in a case where each criminal defendant asserts his innocence, provides information to counsel consistent with that of each other defendant and exculpatory as to all defendants, and affirmatively represents his desire to present a common defense, and where counsel representing all defendants represents that no conflict of interest exists among them and that he can provide full and undivided loyalty to each in connection with his representation, it is error for the court to disqualify such counsel from representing any or all defendants, thereby violating these defendants' constitutional right to be represented by counsel of their choice?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Citations	v
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions and Rules of Procedure Involved	3
Statement of the Case	3
Argument — Summary of Argument	8
I. Multiple Representation	14
A. Multiple Representation Before And After Cuyler v. Sullivan	15
B. The Court of Appeals Erred In Holding That Potential Conflicts Resulting From Multiple Representation Required Disqualification of Counsel	19
C. Every Other Appellate Court Which Has Addressed The Issue Has Held That Trial Courts Have No Discretion To Disqualify Counsel Pre-Trial Where Defendants, Represented By One Attorney, Have Each Asserted Their Right To Counsel Of Choice And Rejected Their Right To Conflict-Free Counsel, Even Where Co-Defendants Have An Actual Conflict Of Interest Among Themselves And Are Not Presenting A Common Defense	23

TABLE OF CONTENTS—(Continued)

II. Federal Rule of Criminal Procedure 44(c) . 33

A. Rule 44(c) Merely Provides A Procedure To Assure The Court That Co-Defendants Assert on Of Their Right To Counsel And Their Rejection Of Their Right To Conflict-Free Counsel Have Done So Voluntarily, With Awareness Of Actual Or Potential Conflicts And Available Alternatives To Multiple Representation . 33

B. Rule 44(c) Cannot Deprive Petitioners Of Their Sixth Amendment Right To Retain Counsel Of Their Choice 38

III. The Trial and Appellate Courts Denied Petitioners Their Right to Have Their Common Defense Presented by Counsel of Their Choice 40

A. The "Joint Defense" Rule 40

(1) Pooling Information Does Not Waive The Attorney-Client Privilege 40

(2) If A Common Defense Breaks Down, Co-Defendants May Use Privileged Information Obtained From Each Other Relevant To The Charges Lodged 42

IV. The Potential Conflicts Indentified by the Trial and Appellate Courts are not Conflicts of Interest Arising from Multiple Representation 47

Conclusion 50

TABLE OF CITATIONS

Page

Continental Oil Company v. United States, 330 F.2d 347 (9th Cir. 1964) 40, 41

Cuyler v. Sullivan, 446 U.S. 335 (1980) 13, 16, 17, 18 19, 22, 24, 27, 33, 36, 37, 39

Dukes v. Warden, 406 U.S. 250 (1972) 18

Glasser v. United States, 315 U.S. 60 (1942) 17, 18, 27

Holloway v. Arkansas, 435 U.S. 475 (1978) 8, 13, 16 17, 18, 19, 22, 27

In the Matter of a Grand Jury Subpoena Duces Tecum, 406 F.Supp. 381 (S.D.N.Y. 1975) . 42, 43

In Re LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981) 41, 43, 44

Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21 (N.D.Ill. E.D. 1980) 43

Olshen v. McMann, 378 F.2d 993 (2d Cir.), *cert. denied*, 389 U.S. 874 (1967) 45

Radiant Burners, Inc. v. American Gas Association, 320 F. 2d 314 (7th Cir. 1963) 44

Smith v. Bordenkircher, 671 F.2d 986 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 107 (1983) 32, 39, 45

United States v. Agosto, 675 F.2d 965 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 77 (1983) . 30, 31 32, 33, 39

United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975) 24, 38

United States v. Cunningham, 672 F.2d 1064 (2d (Cir. 1982) 29, 30, 32, 37, 39

United States v. Curcio, 680 F.2d 881 (2d Cir. 1982) 24, 25, 26, 29, 30, 32, 37, 39

TABLE OF CITATIONS—(Continued)

United States v. Curcio, 694 F.2d 14 (2d Cir. 1982) 26, 27, 28, 29, 32, 37, 39

United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978) 20, 21, 22, 47

United States v. Flanagan, 679 F.2d 1072 (3d Cir. 1982), *aff'g*, 527 F.Supp. 902 (E.D.Pa. 1981) 12, 19, 20, 24, 32, 48, 49

United States v. Garcia, 517 F.2d 272 (5th Cir. 1975) 21, 22, 24, 38, 39

United States v. Goldfarb, 328 F.2d 280 (6th Cir.) *cert. denied*, 337 U.S. 976 (1964) 44

United States v. Laura, 667 F.2d 365 (3d Cir. 1981) 20, 32, 39

United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979), *cert. denied*, 444 U.S. 833 (1979) 41

United States v. Pilnick, 267 F.Supp. 791 (S.D.N.Y. 1967) 45

United States v. Schmidt, 360 F.Supp. 339 (M.D.Pa. 1973) 44

United States v. Schwartz, 372 F.2d 678 (4th Cir. 1967) 34

United States ex rel. Sullivan v. Cuyler, 593 F.2d 512 (3d Cir. 1979), *vacated* 446 U.S. 335 (1980) 15, 16

STATUTES AND RULES:

United States Constitution:

Amendment VI 11, 18, 33, 34, 35, 39

Federal Rules of Criminal Procedure:

Rule 44(c) .. 11, 12, 13, 16, 20, 33, 34, 35, 36, 39

TABLE OF CITATIONS—(Continued)

OTHER AUTHORITIES:

American Bar Association:
Code of Professional Responsibility . . . 13, 37, 47

American Bar Association:
Standard Relating to Defense Function 37

Wigmore, *Evidence* (McNaughton rev. 1961) 44

No. 82-374

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT FLANAGAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

JAMES KEWESHAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

JOSEPH LANDIS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

THOMAS McNAMEE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Opinion of the panel of the United States Court of Appeals for the Third Circuit, affirming the Opinion of the United States District Court for the Eastern District of Pennsylvania, is reported at 679 F.2d 1072 (3d Cir.

1982). A copy of this Opinion is printed in the Appendix at PA2.[1]

The Judgment of the Third Circuit Court of Appeals, dated June 2, 1982, affirming the Judgment of the District Court entered December 4, 1981, is printed in the Appendix at PA32.

The Orders of the Third Circuit Court of Appeals denying Petitions for a Rehearing and recalling its mandate erroneously issued are printed in the Appendix at PA34, PA1.

The Opinion of the United States District Court for the Eastern District of Pennsylvania, affirmed by the panel of the Third Circuit, is reported at 527 F.Supp. 902 (E.D.Pa. 1981). A copy of this Opinion is printed in the Appendix at PA12.

The District Court's Order of December 2, 1981, granting the government's Motion to Prohibit Multiple Representation of Petitioners is printed in the Appendix at PA29.

The District Court's Order of December 4, 1981, granting Petitioners' Motion for Reconsideration and/or Clarification is printed in the Appendix at PA30.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, printed in the Appendix at PA32, was entered on June 2, 1982. On July 12, 1982, the Court denied a Petition for Rehearing, filed by each of the Petitioners herein. PA34. The Petition for a Writ of Certiorari was filed on September 1, 1982, and was granted on January 10, 1983.

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1. All references herein to materials printed in the Appendix to the Petition for Certiorari are designated as "PA____." All references herein to materials printed in the Joint Appendix are designated as "A____."

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF PROCEDURE INVOLVED

United States Constitution:

"Amendment V:

"No person shall . . . be deprived of life, liberty, or property without due process of law; . . ."

"Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Federal Rule of Criminal Procedure 44(c):

"Whenever two or more defendants have been jointly charged . . . or have been joined for trial . . . , and are represented by the same retained . . . counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

STATEMENT OF THE CASE

Petitioners were members of the Philadelphia Police Department's "*grandpop*" squad, a decoy team comprised of volunteers assigned to the stake-out unit, a team of officers that is trained to deal with street crime. The team decoy, posing as a male who is aged and infirm, is likely to attract muggers and robbers who would normally feast upon the truly helpless. Petitioner Flanagan generally assumed the decoy role, with Petitioners McNamee, Keweshan and Landis providing protection and making arrests.

During the Spring of 1981, Petitioners knew[2] that: (1) the Philadelphia District Attorney had begun an investigation into arrests made by the decoy team to determine whether criminal charges should be lodged against the team; (2) a federal grand jury had begun an investigation of the same arrests to determine whether federal charges should be lodged; and (3) the Internal Affairs Unit of the Philadelphia Police Department had begun its own investigation into the same arrests.[3] Moreover, while all three investigations were proceeding, Petitioners were called to state court, on numerous occasions, to testify at preliminary hearings and trials of defendants they had arrested, which arrests were often the subject of these official inquiries.[4]

During this period, each Petitioner independently determined that he needed counsel to assist him in dealing with the complex and confusing situation then unfolding and decided that his own interests were best served by presenting a common front in the face of the investigations. On May 6, 1981, each Petitioner retained the firm of Sprague & Rubenstone to provide representation in each of these matters given each Petitioner's belief in the skill and expertise of the law firm's members, particularly that of Richard A. Sprague, Esquire. Mr. Sprague, an attorney with a national reputation as a prosecutor as well as a defense lawyer, and who had for-

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2. On Sunday, February 1, 1981, the Philadelphia Inquirer, the major daily newspaper in Philadelphia, ran a front page article purporting to investigate the propriety of certain arrests made by Petitioners' decoy team. As a result of this and a spate of other articles, Petitioners were reassigned by the Commissioner of Police to other police duties.

3. Internal Affairs found no evidence of wrongdoing by the team.

4. The District Attorney did not file criminal charges against Petitioners, but he did dismiss five cases lodged against state court defendants arising from the decoy team's arrests based on the fact that each defendant passed a lie detector test. The District Attorney has and continues to press forward with other prosecutions based solely upon arrests and testimony of Petitioners herein.

merly served as First Assistant District Attorney for the City of Philadelphia, was known to each Petitioner as both a fearless and effective advocate,[5] and a person possessed of intimate knowledge of the workings of the Philadelphia Police Department. In fact, Mr. Sprague and the firm had previously represented several Philadelphia Police Officers, charged with criminal offenses, in which instances acquittals had been obtained.

Following a general discussion with Petitioners as to their reasons for seeking legal counsel, Mr. Sprague and members of the firm met at length with each Petitioner, individually. Only after determining that a Petitioner possessed no incriminating evidence respecting himself and the other Petitioners did counsel speak in turn with each other Petitioner. Only after determining that each Petitioner possessed no belief or evidence regarding the matters at issue which conflicted with those of the other Petitioners, did counsel determine that a common defense could be presented on Petitioners' behalf. Only after discussion with each Petitioner did counsel agree that the presentation of a common defense was appropriate and desireable. In short, counsel determined that each Petitioner asserted his innocence as to the charges lodged against him, that each supported the claims of innocence made by each other Petitioner, that no conflicts of interest would exist among and between the Petitioners if all were represented by one attorney,[6] and that a common defense as desired by

5. For example, the Supreme Court of the Commonwealth of Pennsylvania had appointed Mr. Sprague to conduct an investigation into allegations of misconduct by a sitting State Supreme Court Justice. He also, on special appointment, investigated and prosecuted those responsible for the United Mine Worker Assassinations of "Jock" Yablonski and his family.

6. Based on counsel's assessments of the innocence of Petitioners' and the absence of any conflict of interests, counsel instructed Petitioners to appear and to testify at state court trials of persons arrested by the decoy team, even though Petitioners would be subjected to cross-examination and their testimony could be used against them at any future state or federal trial.

each Petitioner, was the proper defense to present on their behalf if charges were lodged against them.

Both prior and subsequent to the return of a federal indictment, Sprague & Rubenstone expended hundreds of hours in connection with the representation of Petitioners, including conducting investigations of the decoy team's arrests, interviewing witnesses, reviewing police records, appearing at state court proceedings, preparing briefs and motions, and advising its clients as to innumerable matters which arose during the course of the representation. Most of this representation dealt with matters separate and apart from the federal grand jury investigation.

Over the next few months, as the Petitioners and counsel continued to work together, Petitioners developed a greater feeling of confidence and trust in the firm of Sprague & Rubenstone and its lawyers, complementing and supplementing the respect for the firm's abilities which had caused each Petitioner initially to decide to retain the firm as counsel. *See, e.g.*, PA68.

On September 10, 1981, four months after the firm was retained, Petitioners were charged with criminal violations of the federal civil rights statutes in a thirteen count indictment returned by a grand jury sitting in the Eastern District of Pennsylvania. The return of an indictment did not alter Petitioners' predetermined decision to proceed upon a common defense even were separate counsel ordered. PA43-PA44. Indeed, from the first date Petitioners appeared in the office of their counsel, each had been advised of potential conflicts of interest and the option of proceeding with separate counsel. PA42-PA45. From the inception of the attorney-client relationship, each Petitioner decided that, despite knowledge of available options and the possibility of judicial intervention in the retention of counsel of his choice, he wished to proceed with a common defense to be presented by the firm of Sprague & Rubenstone. PA52, PA55, PA65-PA66.

In response to the Respondent's Motion for a Hearing and to Prohibit Multiple Representation, which motion sought only to prevent Sprague & Rubenstone from representing more than one Petitioner, the district court held a hearing on November 12, 1981, pursuant to Fed.R.Crim.P. 44(c). At that hearing, each Petitioner repeatedly and unequivocally stated his desire to have a unified defense presented by Sprague & Rubenstone, his awareness of potential conflicts which could arise, his desire to secure his right to counsel of choice over his right to conflict-free counsel, and his willingness to effectuate that choice, through the mechanism of a waiver of potential conflicts of interest.

Midway through the lengthy Rule 44(c) hearing, the trial court stated that "it is quite apparent that there is no actual conflict today." PA45. Following the hearing, the trial court found the following additional facts:

> "It appears to me quite apparent that a conflict of interest is likely to arise in the course of the proceedings.
>
> "It is equally apparent that each of these defendants is fully and completely aware of the potential for conflict of interest, and that each, without financial pressure, has made the decision to waive any claim of conflict of interest, and is doing so intelligently and voluntarily and to be represented by one counsel." PA74.

Based upon these facts, the trial court asked that certain issues be further briefed.

> "I am not satisfied at this moment that in light of my perception that the conflict of interest is very likely to arise in this case, that I can nevertheless accept the waiver of these defendants." PA74.
>
> * * *
>
> "If I do decide that separate counsel are required, does this require that present counsel be eliminated from the case altogether?" PA76.

Briefs were simultaneously submitted on these issues by Petitioners and Respondent on November 19, 1981.

On December 2, 1981, the trial court entered an Order precluding Petitioners from retaining counsel of their choice by disqualifying the firm of Sprague & Rubenstone from representing any Petitioner herein. PA 29. On December 3, 1981, Petitioners filed a Motion for Reconsideration and/or Clarification to assure that the basis for the court's Order was clear. On December 4, 1981, the court granted the Motion, clearly setting forth as the basis for its disqualification — "the presumption that privileged information has been acquired as a result of the attorney-client relationship." PA30.

The trial court stayed its Order so that the correctness of its holding might be determined by the Third Circuit. PA29, PA40. On June 2, 1982, a panel of the Third Circuit issued a Judgment and Opinion affirming the trial court. PA2, PA32. The panel did not contest the validity of each Petitioner's waiver. Rather, it held that it must affirm the trial court's decision unless "there is good cause to believe that no conflict of interest is likely to arise, or that the measures taken were an abuse of discretion." PA5-PA6. The Petitioners filed a Petition for Rehearing and Rehearing En Banc, which Petition was denied by the Court on July 12, 1982. PA34. The Court granted Petitioners' Application for a Stay of Issuance of Mandate, pending the filing of a Petition for a Writ of Certiorari. PA1. The Petition for Certiorari was filed on September 1, 1982. On January 10, 1983, the Petition was granted by this Court.

ARGUMENT

SUMMARY OF ARGUMENT

> "An attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978).

It is shocking that in the nearly two hundred years that this Republic has endured, the question posed by

this case is sufficiently controversial to require Supreme Court review. How is it possible that persons jointly charged with the commission of criminal acts are denied their choice of counsel to present their common defense? How can it be that any court, purporting to act in the best interests of such persons, can deny them the right to be represented by counsel of their choice when, with full knowledge of the allegations against them, the underlying facts, and the theoretical conflicts surrounding such representation, the defendants nonetheless determine to proceed with a common defense presented by chosen counsel and to waive any conflict of interest.

Yet, this Orwellian scenario has in fact occurred in this case, thereby requiring review of the rulings of the trial and appellate courts by this Honorable Court.

The instant situation is well illustrated by the following hypothetical. Assume that four police officers have been charged with the commission of criminal offenses as the result of a frameup; that they are not only totally innocent of all charges lodged against them, but that all relate the same exculpatory facts in support of their defense. Assume that they each determine to present a common defense and that one specific law firm, headed by a lawyer in whom they have supreme confidence and trust, is chosen by them to present that common defense.

Under such facts, were the rulings of the trial and appellate courts in the instant case to stand, a court would have the power to prevent the law firm from representing any of the police officers. Indeed, "potential" conflict could always be made "actual" by an external event beyond the control of the officers, such as the United States offering to plea bargain with one of the wholly innocent officers. Yet it cannot be contended that such an offer, which might never be made or, if made, not accepted, should preclude all of the officers from having chosen counsel present their common defense. Moreover, without knowledge of the facts, a court could

incorrectly surmise that some privileged information disclosing a conflict of interest may have been provided to counsel, thereby requiring counsel's disqualification. Surely, such surmise, being pure speculation as well as an unfounded attack on the integrity of counsel, should not preclude all of the officers from having chosen counsel present their common defense.

This hypothetical is the case at bar. However, in this case, the Court of Appeals held that the trial court did not abuse its discretion in disqualifying the firm of Sprague & Rubenstone from representing any of the Petitioners, and employed an incorrect standard of review. The Third Circuit incorrectly held that it must affirm the lower court's disqualification of Petitioners' chosen counsel unless "There is good cause to believe that no conflict of interest is likely to arise, or that the measures taken [disqualification] were an abuse of discretion." PA5-PA6.

The trial court's actions, affirmed by the Court of Appeals, were also predicated upon its perception that conflicts of interest were likely to arise during the course of the proceedings, based upon the receipt of privileged information from each Petitioner by the law firm. Given this fact, the trial court concluded that its supervisory powers warranted the drastic sanction imposed, despite the knowing, voluntary, and intentional waivers of his right to separate counsel by each Petitioner, and despite Petitioners' continued, avowed desire to have a common defense presented by the law firm.

The rulings of both the trial and appellate courts are erroneous for the following reasons. This Court has held, in the post-trial context, that only an adverse effect on an attorney's performance arising from an actual conflict of interest, based on his representation of several co-defendants, may permit a finding of ineffective assistance of counsel. This same standard cannot be neatly applied to pretrial proceedings, since, prior to trial, no adverse effect on an attorney's performance can be demonstrated. However, it is submitted that before multiple representa-

tion can be barred, there must at least be so substantial a conflict of interest presented as to warrant the Court in presuming a future adverse effect. And such adverse effect may not be the result of external factors, such as a potential plea bargain offer from the United States, for to so hold would preclude multiple representation altogether, since such potential exists in every case. Furthermore, a finding of future adverse effect may not be based solely on the subjective surmise of the trial court, for to so hold would likewise preclude multiple representation. Finally, since a trial court may not learn the facts underlying the common defense and the bases for the defendants' decision to be represented by one lawyer, the predicate for such speculation likewise exists in every multiple representation case.

It is for these reasons that, as this Court has held, the decision respecting the propriety of multiple representation must be left largely with counsel; the role of a court in this process is primarily to assure that the defendant's determinations are made knowingly, voluntarily, and intelligently.

Second, Rule 44(c) of the Federal Rules of Criminal Procedure does not authorize the sanction here imposed. That Rule merely provides a uniform mechanism to assure the court that co-defendants are aware of the potential conflicts arising or which may arise from multiple representation and that their choice of counsel, whoever it may be, is the result of a knowing, intelligent, and voluntary decision. The Rule provides the court with an opportunity to determine whether, in multiple representation cases, the defendants understand the potential difficulties which may ensue from such representation and whether each defendant chooses to exercise his right to counsel of choice over his right to conflict-free counsel. The Rule does not, and cannot, change the law applicable to multiple representation of co-defendants, nor can it be read, interpreted or applied so as to abridge each Petitioner's Sixth Amendment right to counsel of

his choice to present his common defense. Moreover, the general supervisory powers of a court, viewed in concert with or separate from F.R.Crim.P. 44(c), do not permit judicial intervention to deprive any Petitioner of counsel of his choice and to present a common defense where no actual conflict exists.

Third, had Petitioners, in agreeing to present a common defense, each retained separate counsel and had each made themselves available to all counsel in order to prepare and present that common defense, the rationale underlying the opinion of the trial court — and accepted by the Third Circuit — would require the disqualification of each such counsel because the potential conflict arising from counsel having obtained privileged information from each Petitioner is the basis for the Order appealed from. Such a result cannot be justified by either logic or case law. In addition, since the potential conflicts deemed lurking in this matter are, in large part, the inevitable result of each Petitioner's decision to present a common defense and of the trial strategy to be employed to meet that objective, and not the result of multiple representation, and since these choices are likewise constitutionally protected, the trial and appellate courts below erred by precluding the firm of Sprague & Rubenstone from representing each Petitioner in accordance with his express choice.

The Third Circuit's holding that affirmance of the trial Court was required unless "there is good cause to believe that no conflict of interest is likely to arise or that the measures taken were an abuse of discretion," PA5-PA6, was also in error. First, having recognized each Petitioner's waiver of any potential conflict of interest arising from the presentation of their common defense, the trial court had no lawful power to disqualify counsel. Second, the trial court had no discretion whatsoever to interfere with Petitioners' decisions to elevate their constitutional right to counsel of choice over their constitutional right to conflict-free counsel. Third, absent an

actual conflict of interest engendered by *prior* representations, neither Rule 44(c), nor the Disciplinary Rules sanction the judiciary's disqualification of counsel chosen by defendants in a criminal action to present a common defense. Were these Rules interpreted otherwise, they would be unconstitutional, in derogation of each Petitioners' constitutionally protected right to counsel of his choice.

Finally, the most pernicious aspect of the opinions below is the unstated underpinning of their holdings — that the privileged information shared by Petitioners with counsel was not only inconsistent with a common defense but also incriminating as to some or all Petitioners. Had the courts below believed that, for example, each Petitioner had been charged only as a result of mistaken identification, and had not been involved in any way with any crime here charged, neither court would have likely disqualified or countenanced the disqualification of counsel from presenting the common defense of each Petitioner on the basis of counsel's receipt of privileged information.

By presuming the receipt of inconsistent and incriminating privileged information, both the trial court and the Court of Appeals have maligned counsel as well, necessarily assuming that counsel has failed to adhere to the Code of Professional Responsibility, and, in the face of a conflict known to counsel, has nonetheless determined to continue to represent Petitioners.

It is clear that a court is not entitled to know what information has been provided to counsel or why a certain defense strategy has been chosen by Petitioners. It is for these reasons that this Court has repeatedly deferred to counsel's judgment in multiple representation cases. *E.g.*, *Cuyler v. Sullivan*, 446 U.S. 335, 346-347 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978). The unsupported and unsupportable assumption by the courts below that counsel has not acted in accordance with the Code of Professional Responsibility,

and that counsel is therefore not acting in the best interest of each Petitioner, has resulted in the unprecedented intervention by these courts in each client's choice of counsel, based on no more than speculation and each court's assessment of what is best for each Petitioner. Such paternalism is offensive. When based on no facts whatsoever, it is grievous error. Only Petitioners can choose which constitutional right they seek to implement. Only Petitioners know whether the spectre of potential conflicts is real or imagined. Only Petitioners can choose specific counsel as the best vehicle to present their common defense. Given petitioners' voluntary and intelligent choice to be represented by one attorney in this case, no lawful basis exists upon which their choice may be challenged, much less overturned.

I.

MULTIPLE REPRESENTATION

The appellate court below held that the trial court had the discretion to disqualify, pretrial, the counsel chosen and retained by Petitioners, based upon *potential* conflicts of interest which the trial court deemed likely to arise at trial because of multiple representation. The major potential conflict foreseen by the trial and appellate courts was the spectre of some unnamed evil affecting some or all of Petitioners based on counsel's receipt of privileged information from each Petitioner. It is respectfully submitted that this holding is erroneous. Indeed, were it correct, an absolute ban on multiple representation of criminal defendants would be required since the same potential for conflict is inherent in any such lawyer-client relationship.

The multiple representation cases decided by this Court, each of which has arisen in the context of post-trial challenges to convictions, which challenges are based upon allegations of ineffective assistance of counsel due to multiple representation, hold that multiple representation is constitutionally protected and that both

an actual conflict and an adverse effect resulting from that conflict must be established in order to demonstrate a constitutional deprivation. Although these cases refer to post-trial proceedings, the principles which they enunciate are instructive in illuminating the appropriate standards applicable to pre-trial disqualification proceedings arising from multiple representation. No authority exists to support the disqualification of counsel pre-trial where defendants have chosen, in connection with the presentation of their common defense, to assert their constitutional right to counsel of their choice over conflict-free counsel. Here, each Petitioner has so elected, even though such election is couched in terms of waiver. Thus, there is no basis upon which the disqualification of counsel may be sustained.

In order to comprehend the errors and misconceptions of the trial and appellate courts below, it is necessary to trace the development of the views of the Third Circuit, to whom the Writ of Certiorari was issued, on the issues of post-trial review of claims of ineffective assistance of counsel based on multiple representation and conflicts of interest. In particular, it should be noted that the Third Circuit has held, in a post-trial context, that a mere potential for a conflict of interest, no matter how remote, warranted a finding of ineffective assistance of counsel. Although this holding has been corrected by this Court, it now appears that the Third Circuit has resurrected its original and incorrect standard and has applied it, in this case, to pre-trial disqualification proceedings.

A. *Multiple Representation Before And After Cuyler v. Sullivan*

The belief that a potential conflict of interest existing pre-trial, no matter how remote, is sufficient to overturn a conviction based upon ineffective assistance of counsel for multiple defendants represented by one attorney, was the predicate for the Third Circuit's decision in *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512

(3d Cir. 1979), *vacated* 446 U.S. 335 (1980), (hereinafter "*Cuyler I*"). Two privately retained attorneys had represented both Sullivan and two co-defendants in connection with state court murder trials. Sullivan raised no objection to such representation, based, in part, on his inability to afford his own counsel,[7] and was tried and convicted, after resting without presenting a defense. His co-defendants were later acquitted at separate trials.

After exhausting his state remedies, Sullivan filed a habeas corpus petition arguing, *inter alia*, that counsel had a conflict of interest based upon their representation of his two co-defendants. The Third Circuit reversed the denial of the petition, finding that the mere possibility of conflict of interest resulting from multiple representation was sufficient to deprive a defendant of his right to effective assistance of counsel.

On appeal, this Court specifically and unequivocally held that the standard enunciated by the Third Circuit in *Cuyler I* was erroneous. In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), (hereinafter "*Cuyler II*") the Court held both that the Rule 44(c) inquiry is not constitutionally mandated,[8] and that multiple representation does not violate the Sixth Amendment absent an *actual* conflict of interest and an adverse impact on the performance of counsel.

In reaching this conclusion, *Cuyler II* relied heavily on two earlier Supreme Court cases, *Holloway v. Arkan-*

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7. Here, since the Philadelphia Fraternal Order of Police is paying for the representation of each Petitioner [PA49], financial considerations had nothing to do with each Petitioner's desire to retain Sprague & Rubenstone for the purpose of presenting a common defense.

8. "[W]e conclude that the Sixth Amendment imposed upon the [state] trial court no affirmative duty to inquire into the propriety of multiple representation." *Cuyler II*, *supra*, 446 U.S. at 348. Although *Cuyler II* was decided prior to the effective date of Rule 44(c), the Opinion referred both to the proposed rule and case law in reaching this holding. *Id.* at 345-348.

sas, 435 U.S. 475 (1978), and *Glasser v. United States*, 315 U.S. 60 (1942). *Holloway* reversed state court convictions obtained after the trial court had denied the motion of unitary counsel, representing three co-defendants, for appointment of separate counsel based upon actual conflicts of interests.

Writing for the *Holloway* Court, Chief Justice Burger held that "an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted." *Id.* at 485. In so holding, however, this Court was clear that in no way was it suggesting that multiple representation was improper, even in the absence of a common defense. Indeed, relying on *Glasser v. United States*, 315 U.S. 60 (1942), *Holloway* reiterated the propriety and significance of multiple representation:

> "One principle applicable here emerges from *Glasser* without ambiguity. *Requiring or permitting a single attorney to represent co-defendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel.* This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation. In Mr. Justice Frankfurter's view: 'Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack.' *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting)." *Holloway v. Arkansas, supra*, 435 U.S. at 482-83. (Emphasis added).

Given the propriety of multiple representation even absent a common defense, and based on *Holloway* and *Glasser, supra*, *Cuyler II* held that a possibility of conflict from multiple representation is insufficient to warrant a finding that a lawyer's performance was adversely affected and/or ineffective. Justice Powell, writing for

seven members of the *Cuyler II* Court, held that an actual conflict and adverse impact were required to overturn a conviction:

> "We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler II, supra*, 446 U.S. at 350. *Accord: Dukes v. Warden*, 406 U.S. 250 (1972).

It may well be that the *Cuyler II* standard is not easily transferable to pre-trial disqualification proceedings given the likelihood that no adverse impact can then be identified. It may well be that a trial court may utilize some different standard when evaluating pre-trial disqualification motions in multiple representation cases,[9] since interests in addition to those of a defendant are relevant to such pre-trial determination. Nevertheless, the trial and appellate courts below approved the disqualification of counsel chosen to present a common defense based merely on their speculations as to potential conflicts of interest arising from multiple representation. If a pre-trial disqualification can be based merely on such speculation as to potential conflicts, joint representation will be forever banned. As is noted in *Cuyler II* itself:

> "*Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. See 435 U.S. at 482. Since

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9. As will be discussed below, given the valid election by each Petitioner to prefer his right to counsel of choice over his right to conflict-free counsel, the trial court had no discretion to disqualify counsel, even had there been an actual conflict *inter sese*. Nonetheless, as is clear in this case, no matter how narrowly construed, *Cuyler II*, *Holloway*, and *Glasser* authorize the presentation of a common defense by unitary counsel. Such authorization cannot be undercut by a trial court's surmise that a conflict of interest may exist or will arise, especially in the face of a valid election of the right to counsel of choice, through the vehicle of a waiver.

> a possible conflict of interest inheres in almost every instance of multiple representation, . . . a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. Such a presumption would preclude multiple representation even in cases where '[a] common defense . . . gives strength against a common attack.' [*Holloway v. Arkansas*, 435 U.S. 475, 482-83 (1978)], quoting *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting)." *Cuyler II*, *supra*, 446 U.S. at 348.

No such absolute ban has ever been imposed or favorably viewed by this Court. *Cuyler II* and *Holloway* compel the conclusion that the decision to have one firm represent co-defendants to present a common defense is itself constitutionally protected.

Yet, the appellate court below concluded that "the potential for conflict arising from the firm's receipt of confidential information from all the defendants and its obligations in defending just one of the defendants, perhaps at the expense of the others," PA11, justified the disqualification here challenged. Obviously, the Third Circuit is again utilizing its mere possibility of prejudice or conflict of interest standard, specifically repudiated by this Court in *Cuyler II*, and, in so doing, is obliterating the right of multiple defendants to be represented by single counsel within the Third Circuit, in derogation of *Cuyler II* and *Holloway*.

B. *The Court of Appeals Erred In Holding That Potential Conflicts Resulting From Multiple Representation Required Disqualification of Counsel.*

The Court of Appeals reasoned that the *potential* for conflict of interest required the pre-trial disqualification of counsel, despite the acknowledged voluntary, knowing, and intelligent election of each defendant to give preference to his right to choice of counsel over his right

to conflict-free counsel, unsoiled by any financial considerations.[10] This reasoning directly undercuts the Supreme Court's teaching in *Cuyler II*.

Acknowledging that *Cuyler II* required the presence of an actual conflict before a constitutional defect may be raised post-trial and that a defendant could, prior to trial, elect his right to counsel of choice over his right to conflict-free counsel, and that the Third Circuit itself had followed *Cuyler II* by refusing to set aside a conviction and to allow the withdrawal of a guilty plea which had been entered after a knowing and intelligent waiver of the right to conflict-free counsel, *see United States v. Laura*, 667 F.2d 365, 371-73 (3d Cir. 1981), the Court of Appeals nonetheless attempted to distinguish *Cuyler II* from the case at bar by contending that a valid election of the right to counsel of one's choice over the right to conflict-free counsel, accomplished through a waiver of the latter right, need not be accepted by the trial court:

> "It does not follow, however, that because defendants may waive the right to separate representation free from potential conflicts, they have an absolute right, constitutional or otherwise, to have such waivers accepted by the court." PA9.

No legal authority was presented by the Court of Appeals which agreed with its conclusion. In fact, respecting this point, the court cited two cases, each of which required the *acceptance* of such waivers, and weakly noted: that "we respectfully disagree." PA9.

In reaching its contrary decision, the sole authority referred to by the Court of Appeals was *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978). In *Dolan*, decided

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10. As set forth above, since each Petitioner knew that there were no actual conflicts of interest *inter sese* and that the potential conflicts of concern were caused by the decision to present a common defense and not by multiple representation, there was no conflict to waive; rather, the Rule 44(c) proceeding was the vehicle to assure the trial court that Petitioners' election of his right to counsel of choice and his rejection of his right to separate, conflict-free counsel, was knowingly, voluntarily, and intelligently made.

before *Cuyler II* and *Holloway*, the Third Circuit only held that an actual, irremediable conflict of interest disclosed during a trial permits judicial intervention to preclude a defendant from being represented by chosen counsel. In Dolan, both a Mr. Garofolo and a Mr. Dolan retained one Samuel R. DeLuca, Esquire. After both defendants had entered pleas of not guilty, Garofolo pled guilty on the date set for trial and was subpoenaed by the United States to testify against Dolan as a rebuttal witness. During the course of the representation, the court found the following facts: (1) DeLuca had attempted to negotiate with the government for a dismissal of the indictment against Dolan in exchange for a guilty plea by Garofolo, without Garofolo's knowledge; (2) Garofolo, who had originally perceived no conflict of interest, concluded that he should have separate counsel; (3) Garofolo had been denied effective representation from the outset of DeLuca's representation; (4) DeLuca, as Dolan's lawyer, could not effectively cross-examine his former client, Garofolo — now an important prosecution witness — without intruding into facts learned through the attorney-client relationship; and (5) a clear, actual conflict of interest existed between Garofolo and Dolan. Moreover, *Dolan* presented no common defense issue.

It was only under such circumstances that the Third Circuit, relying upon its supervisory powers to control the conduct of members of the Bar, affirmed the disqualification of DeLuca:

> "We hold that when a trial court finds an actual conflict of interest *which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility*, the Court should not be required to tolerate an inadequate representation of a defendant." *United States v. Dolan, supra*, 570 F.2d at 1184 (emphasis added).[11]

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11. In reaching this decision, the Third Circuit distinguished *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975), which had refused to disqualify counsel from multiple representation at a

To be sure, *Dolan* does suggest that a court need not accept a waiver where an *actual*, identifiable conflict exists. Yet the *Dolan* holding flowed from the finding of a specific conflict of interest, in the face of now antagonistic clients who had neither prepared nor presented a common defense. Thus, the issue in *Dolan* was counsel's ability to adequately represent Dolan since, absent a common defense, counsel could not use information obtained from Garofolo to cross-examine him and Garofolo, moreover, had not waived his right to have his privileged communications retain that status. Absent a common defense, Dolan's waiver of his right to conflict-free counsel meant that his lawyer could not effectively cross-examine his chief accuser, thereby necessarily rendering his counsel's performance ineffective. To the contrary, where, as in this case, co-defendants presenting a common defense have chosen their rights to counsel of their choice in lieu of their rights to conflict-free counsel, in order to present a common defense, *Dolan* is irrelevant. *See* Section III, *infra*, at 42.

Most significantly, the trial court in this case found that no actual conflict exists here. Under these circumstances no separate appointment of counsel may be ordered, especially where each Petitioner has chosen to secure his right to counsel of choice. As was held in *United States v. Garcia*, *supra*, 517 F.2d at 276, 277, reversing an order disqualifying chosen counsel from representing defendants on the ground that such counsel also represented unindicted persons who were potential witnesses, *any* conflict of interest arising from multiple representation, whether actual or potential, can be waived

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NOTE — *(Continued)*
pretrial juncture, on the basis that *Garcia* presented only a *possible* conflict of interest, not an actual conflict. *United States v. Dolan*, *supra*, 570 F.2d at 1183. As will be seen below, however, *Garcia* held that both actual and potential conflicts of interest may be waived. Moreover, *Garcia's* facts suggest the existence of an actual conflict of interest.

pre-trial in the face of a knowing, intelligent, and voluntary decision by each such defendant to proceed with counsel of his choice.[12]

Since, prior to trial, a defendant can assert his right to counsel of choice over his right to conflict-free counsel through a "waiver" proceeding, it necessarily follows, as in the instant case, that no court may impinge upon a defendant's constitutional right to counsel of his choice and disqualify counsel where such choice has been made, a valid waiver from all co-defendants has been obtained, and defendants determine to present a common defense at trial. No other appellate court has ever held to the contrary. Indeed, as will be seen below, given *Cuyler II* and *Holloway*, every other appellate court addressing this issue has determined that, under such circumstances, no disqualification may occur.

C. *Every Other Appellate Court Which Has Addressed The Issue Has Held That Trial Courts Have No Discretion To Disqualify Counsel Pre-Trial Where Defendants, Represented By One Attorney, Have Each Asserted Their Right To Counsel Of Choice And Rejected Their Right To Conflict-Free Counsel, Even Where Co-Defendants Have An Actual Conflict Of Interest Among Themselves And Are Not Presenting A Common Defense*

The panel opinion cited no appellate court authority in support of its holding. Indeed, it acknowledged that two other circuits had held to the contrary:

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12. "While we find that the record before us does not permit a determination of whether the defendants *did* waive their Sixth Amendment protections, we conclude that they *can* waive such guarantees. . . .

"Our conclusion that defendants may waive the right to conflict-free assistance of counsel abrogates the need on this pretrial appeal to evaluate the actual or potential ineffectiveness of counsel occassioned by alleged conflicts of interest." *Garcia, supra*, 517 F.2d at 277.

"To the extent that the decisions of two other circuit courts require district court acceptance of waivers in cases of potential or actual conflicts of interest, we respectfully disagree. *See, United States v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975)." PA 9.

Subsequent to the filing of briefs in the Third Circuit in this case, other appellate decisions have addressed this very issue, and each of these holdings is contrary to the panel opinion. On this question, the Third Circuit stands alone.

In *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), (hereinafter "*Curcio I*"), the Second Circuit vacated a pre-trial order precluding counsel from representing both or either co-defendant, based on the trial court's failure to provide the defendants with an adequate opportunity to establish their desire to go to trial with counsel of their choice, despite the presence of potential conflicts of interest. No common defense was proposed by the defendants.

The government moved to disqualify counsel from representing either defendant, based upon its assertion that the defendants played disparate roles in the crimes alleged, the potential for different defenses for each, and the fact of joint representation. No actual conflict of interest was asserted. In reversing the trial court, the Second Circuit held that the trial court must accept a valid waiver of conflict of interests in order to permit a co-defendant to be represented by counsel of choice, relying on *Cuyler II*:

"The principle that the right to separate representation may be waived finds its most recent support in the Supreme Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), in which the same pair of retained attorneys represented three defendants charged with murder. The Court ruled that the mere fact of the multiple representation was not sufficient to establish a violation of Sixth Amendment rights, nor even to alert the state trial court that there might be need for

an inquiry into potential conflicts of interest. The Court stated that '[a]bsent special circumstances, . . . trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.' *Id.* at 346-47 (footnote omitted). The Court construed its earlier decision in *Holloway v. Arkansas*, *supra*, as confirmation that multiple representation is not impermissible:

> '*Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. See 435 U.S., at 482. Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. *Cuyler v. Sullivan*, *supra*, 446 U.S. at 348, 100 S.Ct. at 1718.' "
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> *Curcio I*, *supra*, 680 F.2d at 886.

Holding that an attorney may represent more than one defendant in a criminal prosecution if the defendants knowingly and wilfully so elect, despite the potential conflicts lurking in the background, the *Curcio I* court also stated:

> "Notwithstanding the considerable dangers, however, the teaching of the Supreme Court in *Glasser*, *Holloway*, and *Cuyler* is that defendants may, if they act with their eyes open, elect to be represented jointly by a single attorney. The recently adopted Fed.R.Crim.P. 44(c), . . . does not eliminate the defendant's power to waive his right to be represented by a conflict-free attorney. While the rule imposes on the trial court the duty to make prompt inquiries and to advise the jointly represented defendants as to their

> rights to separate representation, it does not forbid joint representation. It merely requires that where a conflict may arise 'the court shall take such measures as may be appropriate to protect each defendant's right to counsel.' Given the constitutional dimension of the defendant's right to counsel of his own choosing, if the defendant makes a knowing and intelligent election to pursue that right in preference to his right to an attorney of undivided loyalty, disqualification would not protect the Sixth Amendment right that the defendant asserts and would not be 'appropriate.'" *Curcio I*, *supra*, 680 F.2d at 887-88.

Curcio I remanded the case to the trial court for further proceedings to determine whether the defendants' waivers of their right to conflict-free counsel were knowing and intelligent.

In accordance with the *Curcio I* decision, the trial court then conducted an extended Rule 44(c) hearing, after which it precluded counsel from representing both defendants, finding that a defendant's waiver of conflict of interest had not been intelligently made. On appeal, the Second Circuit again reversed, finding that the appellate court had full *de novo* powers of review not only over the question of whether the waiver standard applied by the trial judge was correct but also as to whether the trial court misapplied the applicable standard. *United States v. Curcio*, 694 F.2d 14, 22 (2d Cir. 1982) (hereinafter "*Curcio II*").[13]

In reaching the merits, Judge Friendly, writing for the Second Circuit, began with an analysis of the two conflicting constitutional rights at issue: the right to counsel of one's choice and the right to conflict-free counsel, and noted that the government must not be permitted to choose one right over the other for a defendant:

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13. Thus, the Second Circuit, in *Curcio II*, disagreed with the standard of review adopted by the Third Circuit in this case — abuse of discretion by the trial Court.

"The first step toward decision in this case is to recognize that we are dealing not with a garden-variety case of 'waiver', say, of the privilege against self-incrimination, but rather wth a conflict of two constitutional rights, to wit, the right of a criminal defendant to be represented by counsel of his own choice and the right of such a defendant to counsel whose effectiveness is unimpaired by divided loyalty. What makes the case especially troubling is that the latter right is asserted not by the defendants, who wish to walk away from it, but rather is asserted against them by the Government, whose appropriate concern is simply in avoiding interruption of the trial and in obtaining convictions free from appreciable threat of successful attack. Mere statement would seem sufficient to suggest that a close case should be resolved in favor of those whose liberty is at stake." *Curcio II*, *supra*, 694 F.2d at 22 and n.8.

[n.8] "*It seems to us that a case where a defendant is vigorously asserting his right to counsel of his choosing is not truly a case of 'waiver' at all; it is, rather, a decision to assert one constitutional right rather than another.* See *Kaplan v. Bombard*, 573 F.2d 708, 714 (2 Cir. 1978). Cf. *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131, 132-34 (2 Cir. 1975), *cert. denied*, 426 U.S. 937, 96 S.Ct. 2652, 49 L.Ed. 2d 388 (1976) (assertion of right of self-representation). This is more than a semantic quibble; characterizing the Curcios' choice as one of 'waiver' of the right to conflict-free representation invites judicial scrutiny that is excessively paternalistic and insufficiently protective of the competing right to counsel of choice." (Emphasis added).

Relying on *Glasser*, *Holloway*, and *Cuyler II*, *supra*, the Second Circuit held that the right to counsel of one's choice through joint representation includes the right of a defendant to determine the defense which he

will present and the manner in which that defense can be most effectively presented:

> "The right claimed by the Curcios thus is not merely the right to have their defense conducted by a lawyer who has long represented them, in whose skill and judgment they have confidence, important as that right is, but the right to present their defense in what they have reasonably concluded to be the most effective fashion." *Curcio II*, *supra*, 694 F.2d at 24.[14]

Having reestablished for the second time in the same case the constitutional right of the co-defendants to joint representation by counsel of their choice, as opposed to separate counsel, even absent a common defense, Judge Friendly, relying on the attorney's faithful performance of his professional duty not to "continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be and is likely to be adversely affected," determined that joint representation must be permitted:

> "Some weight also should have been given to [the attorney's] desire to continue the joint representation. In *Curcio I*, *supra*, 680 F.2d at 887-88 n.3, Judge Kearse pointed out that an attorney has an independent professional duty not to 'continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in

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14. In this regard, Judge Friendly opined:

"[T]he judge, much less the prosecutor, is *not* to assume too paternalistic an attitude in protecting the defendant from himself. *Cf. Michigan v. Mosely*, 423 U.S. 96, 108-09 (White, J., concurring) . . . [T]he defendants' choice is to be honored out of respect for them as free and rational beings, responsible for their own fates. It is the defendants, not the judge or prosecutor, who will bear the personal consequences of a conviction. [*Faretta v. California*] 422, U.S. [806] at 834, 95 S.Ct. [2525] at 2540.

representing differing interests . . . .' ABA Disciplinary Rule 5-105(B). [The attorney], no tyro in the criminal practice, had thus been alerted to his responsibilities and knew the consequences of a breach; he had conferred repeatedly with his clients and we must assume that he had satisfied himself. See *Cuyler v. Sullivan*, *supra*, 446 U.S. at 346-47, 100 S.Ct. at 1717." *Curcio II*, *supra*, 694 F.2d at 27-28.

In the case at bar, of course, the Third Circuit merely acknowledged that such concerns had been discussed with Petitioners by counsel, giving no weight whatsoever to the fact that counsel had determined that it could properly and ethically proceed with joint representation and that it should proceed with such representation in the best interests of the Petitioners.

Thus, *Curcio I* and *Curcio II* hold that, even absent a common defense, a defendants' constitutional right to counsel of his choice must be accepted, and that his concomitant decision to "waive" and thereby forego his right to conflict-free counsel, must be respected. Indeed, the very purpose of the waiver proceeding is to create a record of the voluntary election of one constitutional right over the other, thereby protecting the trial and appellate courts from baseless litigation based on claims of ineffective assistance of counsel due to multiple representation.

The *Curcio* decisions were presaged by *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982). In *Cunningham*, the trial court, pre-trial, had rejected the defendants' election of their right to counsel of choice by refusing to accept their waiver of their right to conflict-free representation, and thereupon disqualified defendants' counsel. The Second Circuit reversed this disqualification order, even though an *actual* conflict of interest among the co-defendants was present and had been identified. Observing that the right of a criminal defendant to be represented by retained counsel is "a right of constitutional dimension," and that such a right

ought "not be unnecessarily obstructed by the court," *id.* at 1070, the Court of Appeals held that where the constitutional rights of the defendant to choice of retained counsel and conflict-free representation clash, it is the defendant's choice which will then govern:

> "[I]f Cunningham's right to counsel of his choice conflicts with his right to an attorney of undivided loyalty, *we think the choice as to which right is to take precedence should be left to Cunningham and not be dictated by the government.*" *Id.*, at 1073. (Emphasis added). *Accord: Curcio I, supra*, 680 F. at 885.

The Second Circuit, unlike the Third Circuit, does not stand alone on this issue. In *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982) *cert. denied* 103 S.Ct. 77 (1983), six defendants represented by three counsel appealed from pretrial disqualifications of counsel of their choice based upon the government's assertion of conflict of interest claims, arising both from prior counsels' representation of interested persons and multiple representation of co-defendants. In this latter regard, the *Agosto* court ruled that the trial court in holding that the co-defendants, if jointly represented, could possibly present inconsistent defenses, had abused its discretion in its disqualification of counsel, reasoning that the defendants' assertion that they intended to present a common defense rendered such concern moot:

> "In the criminal context, disqualification on the basis of the attorney's receipt of privileged information from a codefendant formerly represented by that attorney should only be considered upon a clear showing that the present and former clients' interests are adverse. Here, there has been no such showing. . . ." *Id.* at 973.

However, even were a common defense not advanced and an actual conflict found to be present among the co-defendants, the Eighth Circuit nonetheless refused to establish a *per se* rule requiring disqualifications of Counsel:

"Assuming that after further inquiry the district court is satisfied that a clear showing has been made that the interests of defendants Bruins and Newstrum are adverse to the interest of Gustafson, we instruct the district court to consider whether there exists a means of eliminating the potential conflict less burdensome than disqualification. As we noted earlier, a client may consent to his former attorney's representation of adverse interests. . . .

"We note that Bruins and Newstrum never filed a motion for Walters' disqualification and never actively supported the government's motion. Under these circumstances, we hold that the district court should inquire of defendants Newstrum and Bruins as to their willingness to consent to Walters' continued representation of Gustafson, and use of backup counsel.

"If Newstrum and Bruins are willing to consent, we see no reason to reject Gustafson's proposal to employ a backup counsel as a satisfactory resolution of the conflict. If they do not consent, however, and there is a clear showing of adverse interests* then we concur in the district court's exercise of discretion and disqualify attorney Walters."

*"If the district court determines that the interests of the defendants are not adverse, it will only be because all defendants, including Bruins and Newstrum, represent that *they intend to present a joint defense and that there are, therefore, no conflicts of interest*. Under these circumstances, we consider it appropriate to require Bruins and Newstrum to execute an informed consent to Walters' continued representation of Gustafson, and use of backup counsel if necessary. In this way, the interest of the district court in insuring the integrity of the proceedings from post-conviction attack will be protected should the defendants prove wrong in their assessment of trial strategy."

United States v. Agosto, supra, 675 F.2d at 973-974, and n.9 (Other footnotes omitted).

Thus, the Second Circuit in *Curcio I* and *II* and *Cunningham;* the Fifth Circuit in *United States v. Garcia, supra;* and the Eighth Circuit in *Agosto* have each held that through the vehicle of a *pre-trial waiver*, defendants can choose to secure their right to counsel of choice in the face of potential and even actual conflicts of interest based upon joint representation of defendants charged in the same action.[15] These courts have recognized that this choice is binding and *must* be accepted by the trial court and that a defendant may stand on his Constitutional right to go to trial with counsel of his choice.[16] And it is worth emphasizing that none of these cases, save *Agosto*, dealt with common defenses.

Where trial strategy is bottomed on a common defense, by definition, there can be no conflicts of interest.

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15. In *Smith v. Bordenkircher*, 671 F.2d 986 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 107 (1983), a post-trial attack on state court convictions, the reported opinion does not discuss whether any pretrial waiver proceeding occurred. In *Smith*, the court relied on *Cuyler II* in holding that a lawyer representing multiple criminal defendants need not withdraw as counsel for the remaining defendants where one defendant turns state's evidence, thus creating a potential conflict of interest:

> "This two part test [of *Cuyler II*] does not permit the formulation of strict rules against a lawyer's continued representation of remaining co-defendant's if an indicted former client pleads guilty and cooperates with the prosecution. Rather, the *Cuyler* test directs us to determine, on the facts of each case, whether there is an actual conflict of interest and whether that conflict has caused ineffective performance in violation of the provisions of the Sixth Amendment . . ." *Id.* at 987.

16. Interestingly, the Third Circuit has so held as well in *United States v. Laura*, 667 F.2d 365, 371-73 (3rd Cir. 1981). Thus, in order to distinguish the instant case from *Laura*, the court in this case fallaciously reasoned that a waiver, sufficient to preclude a post-conviction attack for actual prejudice shown, is somehow insufficient to support a pretrial constitutionally protected choice to have retained counsel present a common defense. *See* PA8-PA9.

United States v. Agosto, supra, 675 F.2d at 974, n.9. Therefore, the incorrectness and impropriety of the panel opinion below is all the more glaring. What makes the opinion even more suspect is its reliance on a mere procedural rule, and not on any right of constitutional dimension.

II.

FEDERAL RULE OF CRIMINAL PROCEDURE 44(c)

A. *Rule 44(c) Merely Provides A Procedure To Assure The Court That Co-Defendants Assertion Of Their Right To Counsel And Their Rejection Of Their Right To Conflict-Free Counsel Have Done So Voluntarily, With Awareness Of Actual Or Potential Conflicts And Available Alternatives To Multiple Representation*

As is set forth in *Cuyler II, supra*, the Rule 44(c) inquiry is *not* of constitutional dimension. Were it otherwise, then the state court in *Cuyler II* would have been compelled, on Sixth Amendment grounds, to hold a Rule 44(c) hearing. Thus, Rule 44(c) provides a procedure by which a court, through the exercise of its supervisory powers, can assure itself that co-defendants who choose to be represented by one attorney in order to obtain counsel of their choice and who choose to relinquish their right to conflict-free counsel act knowingly and intelligently, thereby assuring that the record of that choice is sufficient to withstand any post-conviction challenge, should such challenge arise. The Rule states:

> "Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

The right to counsel which the Rule is designed to protect has two prongs, each bottomed on the Constitution: the defendant's right to counsel of choice and the defendant's right to conflict-free counsel. Since both rights

belong to the defendant, the defendant must be able to choose which of these rights is to predominate where the rights conflict. The Rule is silent respecting "appropriate measures" where the exercise of the right to counsel of choice raises the spectre that counsel may not be conflict-free. Nonetheless, counsel is unaware of any appellate case, save the case at bar, which upheld a lower court's disqualification of unitary counsel chosen by co-defendants who wished to present a common defense through that counsel, nor does the committee note, or cases cited therein, provide any support whatsoever for such judicial action. This should not be surprising since "to protect each defendant's right to counsel," the trial court must give full weight to the defendant's choice of counsel when the defendant gives preference to his right to choice of counsel over his right to conflict-free counsel.

Moreover, it necessarily follows that the Rule itself cannot be authority for the harsh sanction authorized by the trial and appellate courts below, since the Rule was not intended to affect substantive rights of constitutional dimension but was rather designed to secure uniformity and simplicity of criminal procedures and to assure that each defendant in a federal criminal action understands and appreciates both aspects of his Constitutional right to counsel, and voluntarily selects one prong over the other.[17]

Since the rule does not and cannot alter the substantive law respecting the power of the trial court to order appointment of separate counsel, the "appropriate measures" which may be taken even where there is good cause to believe a conflict likely to arise cannot include

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17. The Federal Rules of Criminal Procedure are rules of procedure which cannot substantively alter constitutional rights. *See United States v. Schwartz*, 372 F.2d 678, 682 (4th Cir. 1967).

the disqualification of counsel here ordered,[18] where co-defendants desiring to present a common defense clearly select that right over their right to conflict-free counsel.

Where Petitioners find particular fault with the trial court's use of Rule 44(c), as affirmed by the appellate court, is in the trial court's interpretation of its obligation, under that Rule, to "protect each defendant's right to counsel" once it is determined that a conflict is likely to arise. Without recognizing that the "right to counsel" encompasses the right to counsel of one's choice as well as to conflict-free representation, and without acknowledging the right of each Petitioner to choose which of these rights is more important to him in this case, both courts read that portion of the Rule as requiring the trial court only to determine at a preliminary stage of the proceeding whether a conflict will likely occur at some future point in the proceedings, and to disqualify counsel based only on that potential "conflict."

There is nothing in the language of the Rule itself which permits, let alone requires, a court to override each Petitioner's selection of his right to counsel of choice and his rejection of his right to conflict-free representation. Although the terminology utilized in connection with Rule 44(c) proceedings is that of "waiver," in fact, that terminology is somewhat misleading, for the matter at issue in such a proceeding is the election by

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18. Petitioners submit that "appropriate measures" authorized by the Rule where a conflict of interest is found *likely* to arise among co-defendants include: specific advice as to the nature, purpose, and scope of the right to separate counsel; the right to have counsel appointed if financial considerations are at issue; and the taking of a valid waiver in order to assure that a defendant's right to counsel of his choice is preserved, all to demonstrate that defendants are voluntarily and intelligently asserting their right to be represented by one attorney, and to further create a record of the defendants' intelligent waiver of their right to conflict-free counsel, in order to protect against any post-conviction attack.

each defendant of one constitutional right and the rejection of the other. Furthermore, the Rule does not even mention disqualification as a prophylactic measure to assure conflict-free representation. Thus, in exercising its supervisory power to protect a defendant's right to counsel under Rule 44(c), it is submitted that courts must respect a defendant's choice. If either of the courts below had so acted, no disqualification of counsel would have occurred.

In interpreting Rule 44(c) as a command to determine whether to permit joint representation rather than as a command to take such steps as may be appropriate to protect the Petitioners' rights to choice of counsel, the courts below gave the Rule a gloss which simply cannot pass constitutional muster. The Supreme Court has made it clear that once defendants have been advised of the perils of joint representation, the court cannot presume, that "the *possibility* for conflict . . . results[s] in ineffective assistance of counsel." *Cuyler II*, *supra*, 446 U.S. at 348. The fact that Rule 44(c) directs district court judges to protect the right to counsel, then, does not justify the denial of Petitioners' right to counsel of their choice. Under Rule 44(c), the trial court is to advise co-defendants of the two prongs of their constitutionally protected right to counsel in order to assure that each co-defendant intelligently and voluntarily exercises his freedom of choice as to which right he wishes to protect. This is the purpose of the Rule and the reason for conducting, pretrial, the Rule 44(c) proceeding. Once a co-defendant makes his choice, and once the court is satisfied that the election is a voluntary and intelligent one, the defendant's decision must be honored. Most certainly, that decision cannot be undermined or rejected based on non-existent spectres of potential conflicts lurking only in the recesses of the trial court's mind. It is strange indeed that a Rule which is designed to protect a defendant's right to choice is used by the Third Circuit, in this case, to defeat that very right.

It cannot be overemphasized that, in the case at bar, there are no conflicts of interest. Thus, no Petitioner was compelled to waive any right to conflict-free counsel, for counsel is conflict-free. These facts, too, were disregarded by the trial court and underscore the incorrectness and offensiveness of the trial court's refusal to permit Petitioners to proceed with counsel of their choice.

This absence of any conflict also establishes that the disqualification of counsel appealed from in this case cannot be premised upon the trial court's responsibility to supervise the members of its Bar. Counsel recognizes full well that the ethical standards of the Bar discourage joint representation of multiple defendants in most instances. In recognition of those standards and the obligations imposed by them, counsel undertook a searching inquiry, some of which was described to the trial court, after which counsel determined that no conflict of interest exists among Petitioners and so represented to the trial court. Counsel further determined that, under the facts of this case, it could give its undivided loyality to each Petitioner. As a result, there is absolutely no predicate relating to the court's responsibility to supervise the members of its Bar upon which the disqualification of counsel can be based. Moreover, it is important to note that the ethical standards do not, and cannot, erect a *per se* rule prohibiting multiple representation. *See* ABA Standards Relating to the Defense Function, at 235, commentary.

As the decisions in *Cuyler II*, *Curcio I* and *II*, and *Cunningham*, *supra*, made clear, given the weight which must be placed on the integrity of counsel and the right of each co-defendant to prefer one aspect of his constitutional right to counsel over the other, neither the government's nor the court's generalized concern for standards of the Bar can be employed to obliterate a defendant's right to counsel of his choice. *See, e.g.*, *United States v. Cunningham*, *supra*, 672 F.2d at 1073. Similarly, in this case, Petitioners, in order to present a

common defense, have stated their avowed intention to fully and freely make themselves available to each other and each other's counsel, should they be denied their unitary counsel of choice to present that common defense. A43. Their assertion of their right to counsel of choice and their rejection of their right to conflict-free counsel is crystal clear on the record. Under these circumstances, permitting counsel chosen by Petitioners to present their common defense eradicates any appearance of impropriety and fully protects the integrity of the system and the interests of the Petitioners themselves.

B. *Rule 44(c) Cannot Deprive Petitioners Of Their Sixth Amendment Right To Retain Counsel Of Their Choice*

The Order appealed from undermines the rights of co-defendants to counsel of their choice. In *United stated v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975), the Second Circuit reversed an order disqualifying retained counsel on conflict grounds, stating:

> "[T]he district court did not give sufficient weight to the appellants' rights. Although the right to an attorney of one's choosing is not unlimited, the Sixth Amendment does give some protection to a criminal defendant's selection of retained counsel. . . . *Cf. Faretta v. California*, 422 U.S. 806, 95 S.ct.2525.45L.Ed.2d v 562 (1975), holding that there is a constitutional right to proceed pro se, and observing that the right to manage one's own defense is at the heart of the Sixth Amendment guarantees. . . . The client, however, may waive his Sixth Amendment rights to effective assistance of counsel . . . just as he may knowingly and intelligently waive any constitutional rights." *Id.* at 592. [Citations omitted].

And in *United States v. Garcia, supra*, city police officers, charged with federal offenses, including 18 U.S.C. §§241 and 242, obtained private counsel. Two officers retained one attorney; the remaining seven retained two attorneys who, in addition, represented fifteen other po-

lice officers who would likely testify at trial, many of whom had testified before the grand jury. In reversing the trail court's pre-trial Order disqualifying the three lawyers from any representation of the nine defendants, the Fifth Circuit assumed actual conflicts engendered from multiple representation, but held nonetheless that such conflicts could be waived:

> "We hold only that if, as a matter of fact, a defendant after thorough consultation with the trial judge knowingly, intelligently and voluntarily wishes to waive (the right to conflict-free representation, the Constitution does not prevent him from so doing." *United States v. Garcia, supra*, 517 F.2d at 278.[19]

Thus, the Second, Third, Fifth, Sixth, and Eighth Circuits have placed their imprimatur upon a defendant's right to determine whether his right to counsel of choice is more important to him than his right to conflict-free counsel in multiple representation cases after an inquiry, patterned on Rule 44(c), establishing the constitutionally requisite predicates for such a choice. Moreover, in *Cuyler II*, the Supreme Court noted that the Rule 44(c) inquiry was not of constitutional dimension. Therefore, it is clear that Rule 44(c) does not expand upon the powers of the trial court to disqualify counsel from multiple representation of co-defendants in a criminal action. Rather, the Rule merely sets forth procedures to be followed in order to assure that each defendant understands both prongs of his Sixth Amendment right to counsel and that his election is a voluntary and intelligent one, thereby precluding any post-conviction attack based on the joint representation. Once a defendant has made such choice, the courts mus. recognize that the choice is constitutionally protected, and must act to assure that the defendant's decision is honored.

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19. *Accord*: *Curcio I*, *Curcio II*, *Cunningham*, *Smith*, *Laura*, and *Agosto*, *supra*, each decided post-*Cuyler II* and *Holloway*. *Garcia* and *Amedo-Sarmiento* were decided prior to *Cuyler II* and *Holloway*.

III.

THE TRIAL AND APPELLATE COURTS DENIED PETITIONERS THEIR RIGHT TO HAVE THEIR COMMON DEFENSE PRESENTED BY COUNSEL OF THEIR CHOICE

By denying Petitioners their constitutionally protected right to counsel of their choice, despite the absence of any conflicts among them, the trial and appellate courts ignored the fact that, by their rulings, they severely compromised and jeopardized Petitioners' constitutionally protected right to present a common defense through a specific lawyer and failed to recognize that no basis for disqualification exists where the sharing of privileged information occurs solely as a result of the presentation of a common defense by counsel representing multiple defendants.

A. *The "Joint Defense" Rule*

Where privileged information is disclosed by a defendant or his counsel to co-defendants or their counsel to facilitate the presentation of a common defense, such disclosure is not a waiver of the attorney-client privilege, not does such information-sharing constitute a conflict of interest or result in ineffective assistance of counsel.

(1) *Pooling Information Does Not Waive The Attorney-Client Privilege*

Continental Oil Company v. United States, 330 F.2d 347 (9th Cir. 1964), was the first federal case to recognize the "joint-defense exception" to waiver of the attorney-client privilege. Employees of Standard Oil and Continental Oil had been subpoenaed to appear before a grand jury. Attorneys for each corporation had represented their employee-witnesses individually. Before and after grand jury testimony, the employees for both companies were interviewed by their attorneys, who then prepared and exchanged memoranda on the briefing and debriefing sessions. Prior to returning indictments, subpoenas duces tecum were issued to obtain

the memorandum. Motions to Quash were filed, based on the attorney-client privilege.

In quashing the subpoenas, the Court found no waiver of the privilege, stating:

> "[Counsel] exchanged such memoranda in confidence in order to apprise each other as to the nature and scope of the inquiry proceeding before the grand jury . . . in order to make their representation of their clients in connection with the grand jury investigation and any resulting litigation, more effective." *Id.* at 348-49.

This "common defense" rule has been recognized as a time honored tenet of state law. As was noted in *United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979), in precluding compelled disclosure of statements made by a co-defendant to defendants' attorney and investigator, the Seventh Circuit summarized the rule as follows:

> "[C]ommunications by a client to his own lawyer remain privileged when the lawyer subsequently shares them with co-defendants for purposes of a common defense. The common-defense rule . . . has been recognized in cases spanning more than a century. Uninhibited communications among joint parties and their counsel about matters of common concern is often important to the protection of their interests. In criminal cases it can be necessary to a fair opportunity to defend. Therefore, waiver is not to be inferred from the disclosure in confidence to a co-party's attorney for a common purpose." *Id.* at 1336. (citations omitted) *Accord: In re LTV Securities Litigation*, 89 F.R.D. 595, 604 (N.D. Tex. 1981)

Since pooling of information by co-defendants jointly charged but separately represented does not create a conflict of interest or result in ineffective assistance of counsel, there is neither logic nor case law to support a different conclusion solely because such co-defendants are represented by counsel associated with one firm.

The only additional question raised by co-defendants jointly charged pooling information in order to present a common defense is under what circumstances, and by whom, may the attorney-client privilege be waived and what occurs, in the common defense situation, when one defendant so represented decides to turn on his co-defendants? To this queston, we now turn.

(2) *If A Common Defense Breaks Down, Co-Defendants May Use Privileged Information Obtained From Each Other Relevant To The Charges Lodged.*

In the Matter of a Grand Jury Subpoena Duces Tecum, 406 F.Supp. 381 (S.D.N.Y. 1975), attorneys were served with a grand jury subpoena seeking memoranda of interviews conducted by them in connection with an SEC investigation and a subsequent civil action involving securities fraud schemes. The attorneys declined to produce the documents, relying on the attorney-client and work product privileges. The Court held that the memoranda were subject to the attorney-client privilege since they reflected statements made at interviews designed to promote the joint defense of the persons interviewed. In these regards, the Court stated:

"[W]here there is consultation among several clients and their jointly retained counsel, allied in a common legal cause, it may reasonably be inferred that resultant disclosures are intended to be insulated from exposure beyond the confines of the group; that inference, supported by a demonstration that the disclosure would not have been made but for the sake of securing, advancing or supplying legal representation, will give sufficient force to a subsequent claim to the privilege. . . .

"*To be sure, what is divulged by and to the clients present at such a meeting cannot be deemed to be confidential inter sese; in any later controversy between or among those clients, the privilege could not stand*

as a bar to full disclosure at the instance of any one of them." In Re Grand Jury, supra, 406 F. Supp. at 386. (Emphasis supplied). *Accord: Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980). Thus, while disclosures made among and between the parties in connection with a joint defense are immune from discovery to the outside world, the cost to defendants for such protection is that defendant "A" cannot raise the privilege to bar defendant "B" from using information gained from defendant "A" in the event the joint defense breaks down and defendant "B" adopts a position hostile to defendant "A":

> "The attorney-client privilege as noted above, is no less vital to the functioning of a joint defense than it is to the proper course of wholly independent representation. Nevertheless, in at least the one aspect already examined, the law exacts a higher cost for participation in a joint defense. To be sure, confidences shared by joint defendants and their counsel are effectively shielded from outside access. On the law established to date, that shield may be lowered only when the parties once joined assume the stance of opposing parties in subsequent litigation. This restructuring of the parties' rights is a logical incident of their later posture: when they face one another in litigation, neither can reasonably be allowed to deny to the other the use of information which he already has by virtue of the former's own disclosure." *In The Matter of a Grand Jury Subpoena, supra*, 406 F.Supp. at 394.

Similarly, in *In Re LTV Securities Litigation, supra*, the court held that a corporation could assert the attorney-client privilege against shareholders' attempts to discover materials generated by various corporate attorneys in the course of conducting an internal investigation begun after the Securities and Exchange Commission had filed charges against the corporation. In the course of its opinion, the court held that the privilege applied against outsiders based upon the "joint defense

privilege," but that if the parties had a falling out, only joint invocation of the attorney-client privilege would preserve the privilege:

> "Even should such allies later become estranged, they would arguably still be entitled *jointly* to invoke the attorney-client privilege to protect shared confidences from disclosure at the behest of a third party." *Id.* at 604, 605. (Emphasis supplied)."

LTV relied on *In the Matter of a Grand Jury Subpoena*, *supra*, for the proposition that the attorney-client privilege cannot shield full disclosure in controversies among and between defendants themselves; rather, the privilege serves to bar discovery only against the "rest of the world." *Id.* at 605.[20]

Thus, in cases in which defendants jointly accused desire to prepare a common defense, and to make themselves available to one counsel representing all co-defendants or to various counsel, each representing individual defendants, for that purpose, the transfer of information among and between the parties and their counsel is not deemed to effect a waiver of the attorney-client privilege. Indeed, the privilege remains inviolate. However, if there is a falling out among the co-defendants who had shared information for a common defense, so that a co-defendant determines to proceed in the absence of a common defense, the remaining co-defendants are free to waive the privilege and use all the information obtained in connection with the preparation of the common defense against the now adverse co-defendant.

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20. The burden of establishing the foregoing rests on the claimant seeking to assert the privilege and its scope should be "strictly confined within the narrowest possible limits." 8 Wigmore, *Evidence*, §2291, at 554 (McNaughton rev. 1961); *United States v. Goldfarb*, 328 F.2d 280 (6th Cir.) cert. denied, 377 U.S. 976 (1964); *United States v. Schmidt*, 360 F.Supp. 339 (M.D.Pa. 1973); *see Radiant Burners, Inc. v. American Gas Association*, 320 F.2d 314 (7th Cir. 1963).

This same conclusion adheres even where the co-defendant becomes a witness for the government. In *Olshen v. McMann*, 378 F.2d 993 (2d Cir.) *cert. denied*, 389 U.S. 874 (1967), in which the attorney for the defendant had previously represented the government's chief witness, the Court held that the witness' disclosure to the government effected a waiver of any claim to confidentiality respecting communications to his attorney. *Accord: Smith v. Bordenkircher, supra*; *United States v. Pilnick*, 267 F.Supp. 791, 798 n.16 (S.D.N.Y. 1967)

This result necessarily flows not only from the cases cited above but also from an analysis of the nature of the attorney-client privilege itself. Where a lawyer represents a single client, the attorney-client privilege is that of the client and may be waived by that client. Where a lawyer represents many co-defendants who pool information in order to present a common defense, the attorney-client privilege is that of each of the co-defendants, and may be waived by any one of them. The distinction is that where one such co-defendant waives the attorney-client privilege, that waiver is applicable to all the co-defendants, for that co-defendant is free to disclose all he learned from the other co-defendants in connection with the preparation of the common defense. That risk is a risk inherent in the presentation of a common defense. It is submitted that this risk ought be spelled out to co-defendants by counsel, and be part of any inquiry conducted by a trial court where a common defense is to be raised. It must be reiterated, however, that the attorney-client waiver question, in those cases where a common defense is raised, is wholly unrelated to multiple representation and cannot serve as the basis for disqualification of counsel representing multiple defendants.

(3) *If A Common Defense Breaks Down, The Privilege Question Posed Is Identical Whether Co-Defendants Had One Counsel Or Multiple Counsel*

The trial court believed that a conflict might arise if the common defense broke down, thereby precluding counsel from cross-examining the estranged defendant:

"Q. Now, in the event that you are wrong and one of the other defendants should decide to turn tail, do you realize that if that defendant were to take the stand, if you were represented by separate counsel your attorney would have the right to cross-examine that person. If you are represented, all of you, by the same attorney, you could not expect the one attorney who had represented this person to cross-examine him, could you?

"A. No, Sir.

"Q. So that you would run the risk by single representation that if you are wrong in your assessment of all the defendants being willing to stand together throughout, you would be giving up a chance for cross-examination of one of your co-defendants if he should take the stand?

"A. Under those conditions, yes sir." PA47-PA48

The trial court based its disqualification order on this premise. PA30-PA31. The Third Circuit never discussed this issue. It is submitted that, for the reasons set forth above, the trial court's statements of the applicable law, as set forth in the above-quoted colloquy, were erroneous since the breakdown of the common defense *would* permit each co-defendant to use privileged information in the cross-examination of an estranged defendant, and that, for this additional reason its disqualification order must be overturned.[21]

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21. In this regard, it must be noted that this error of law may have invalidated the colloquy. On the record as it now stands, no Petitioner was advised either that information obtained through the attorney-client relationship could be used against an estranged defendant, or that an estranged defendant could use information so obtained against each Petitioner. This failure might, theoretically, render invalid each waiver obtained in the trial court. Thus on remand, the trial court should conduct a subsequent colloquy to formally advise Petitioners of these facts, although no conflict exists among Petitioners as each has presented information to counsel exculpatory to each and to the other Petitioners.

Nonetheless, regardless of the appropriateness of the trial court's comments, the legal question posed is the same whether the privileged information is divulged by each co-defendant to one firm representing *all* co-defendants or by each co-defendant to all separate counsel in connection with the preparation of a common defense. Since the same so-called "conflict" — the exchange of confidential information — is present in either circumstance, it necessarily follows that the spectre of that "conflict" cannot serve as a predicate for disqualifying counsel here. To hold otherwise would disqualify any counsel from ever representing any defendant where a common defense was initially decided upon as the trial strategy to be employed, for the possibility that any one defendant may turn on his co-defendants will always exist.[22]

IV.

THE POTENTIAL CONFLICTS IDENTIFIED BY THE TRIAL AND APPELLATE COURTS ARE NOT CONFLICTS OF INTEREST ARISING FROM MULTIPLE REPRESENTATION

As set forth above, Petitioners determined that they should present a common defense in order to gain strength against a common attack. They chose the firm of Sprague & Rubenstone as the vehicle through which their desires would be best implemented. Nonetheless, had they each retained separate counsel, in whom they reposed less trust and confidence, the same information would have been shared among and between co-defen-

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22. Here, were one defendant to turn on his co-defendants, counsel would necessarily cease its representation of such adverse defendant or the remaining defendants, not because of a "conflict" engendered by receipt of privileged information, but because of an actual conflict caused by divergent defense postures and counsel's resultant inability to adequately and effectively represent all defendants. *United States v. Dolan, supra*. *See* DR5-105.

dants and their counsel in order to secure the best possible presentation of the common defense. PA43. Moreover, the shared information disclosed the absence of any conflict, since each Petitioner has asserted his innocence, has related exculpatory information both as to himself as well as to his co-defendants, possesses no incriminating information relating to himself or any other Petitioner, and possesses no information inconsistent with that possessed by any other Petitioner.

Despite the constitutional protection surrounding their choice of counsel, the Third Circuit precluded any Petitioner from having counsel of his choice finding that the trial court's decision to "take the initiative and exercise its discretion to avoid a serious potential for conflict before jeopardy attaches," PA25, was within its discretion. However, upon reasoned analysis, it becomes apparent that these "potential conflicts" identified by the trial courts below are not conflicts of interest resulting from multiple representation; rather, they are the inevitable results of joint strategies employed in connection with the presentation of a common defense, which strategies cannot properly be considered or questioned by any court during the course of a Rule 44(c) inquiry. For example, considering the eight (8) points set forth in the trial Court's Opinion, PA14-PA15, constraints imposed on counsel representing multiple co-defendants in a criminal action in connection with opening and closing statements, sentencing, possible grants of immunity, and a defendant's exercise of his right to testify are all constraints arising as well, and to similar degrees, in instances of a common defense agreed upon by co-defendants represented by separate counsel. Further, these constraints to the extent they do exist, grow out of tactical decisions made by counsel and their clients, are inextricably intertwined with the determination to present a common defense and the election to be represented by one attorney, are decisions which the court has no right to question, and cannot serve as grounds for finding the existence of any conflicts of interest.

Likewise, the trial and appellate courts also feared that "spillover" caused by multiple representation might cause a jury to improperly infer negative facts as to certain Petitioners. However, "spillover" might similarly cause a jury to infer positive facts as to "certain Petitioners. Nonetheless, such "spillover" does not raise conflict of interest issues; rather, should it occur, it is the result of trial strategy, based upon the defendants' initial decision to present a common defense and to be represented by a single attorney.

Another major concern expressed by the lower courts was their fear that Petitioners Keweshan, NcNamee, and Landis might be prejudiced by virtue of their association with Flanagan and by counsel's possible inability to distance them from Flanagan. PA6-PA7; PA14-PA16. However, to the contrary, it may well be that Keweshan, McNamee, and Landis would benefit from being identified with Flanagan. In either respect, no conflict of interest is inherent in such an association and it is the defendants, after consultation with their counsel and as a matter of trial strategy, who have the unalterable right to make just such a decision. Furthermore, such a risk, if any exists, is attendant to any case in which there is a common defense made for co-defendants, and is wholly irrelevant to multiple representation or conflict of interest issues.

Indeed, it is clear that the decisions of the trial and appellate courts were based, in part, on their unstated and mistaken assumptions that the defenses of Petitioners are antagonistic and that Petitioners have information which is incriminatory as to the others and, in part, on the belief of these courts that they had the authority to inject themselves into each Petitioner's right to determine the trial strategy and the defense which each would present to the charges. Beyond any doubt, this usurption by the Third Circuit and the District Court of the rights of Petitioners to present a common defense to the charges which have been brought and to counsel of

their choice cannot be tolerated and must be condemned.

CONCLUSION

For all of the reasons set forth above, the Order of the Third Circuit Court of Appeals should be reversed and the matter remanded with instructions that the trial court proceed with pretrial matters. Petitioners' day in Court, assisted by counsel of their choice to present their joint defense, has been delayed long enough.

Respectfully submitted,
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OCTOBER TERM, 1983

ROBERT FLANAGAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a pretrial order disqualifying defense counsel in a criminal case is immediately appealable.

2. Whether the district court possessed and properly exercised the power to disqualify counsel jointly representing all four petitioners on the basis of its finding that there existed serious potential conflicts of interest among them, notwithstanding their attempted waiver of their right to conflict-free representation.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional provisions and rule of procedure involved	1
Statement	2
Summary of argument	9
Argument:	
I. A pretrial order disqualifying defense counsel in a criminal case is not an immediately appealable "Final Decision" within the meaning of 28 U.S.C. 1291	14
A. Interlocutory appeals have been found appropriate in only a few discrete and strictly limited categories of criminal cases	16
B. Orders disqualifying defense counsel in criminal cases do not meet the strict standards justifying interlocutory review	22
1. There is no "right not to be tried" in the absence of the services of a particular lawyer	22
2. The right asserted by petitioners can be adequately protected on appeal from a final judgment	26
3. Departure from traditional considerations of finality is unwise in the circumstances of this case	29
II. If appealable, the district court's disqualification order should be affirmed	36
A. The Sixth Amendment does not protect a defendant's decision to engage a particular lawyer	38

Argument—Continued Page

B. Any right to engage the services of a particular lawyer is a qualified one, subject to reasonable restrictions 4

C. A criminal defendant has no right to insist on a particular attorney where such representation is contrary to the accepted ethical standards of the legal profession 47

Conclusion 65

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 ..... 9, 19, 20, 21, 23
Andersen v. *Treat*, 172 U.S. 24 ..... 40, 41
Arkansas v. *Dean Foods Products Co.*, 605 F.2d 380 56
Barker v. *Wingo*, 407 U.S. 514 ..... 9, 17, 18, 33
Bedrosian v. *Mintz*, 518 F.2d 396 45
Berman v. *United States*, 302 U.S. 211 14
Betts v. *Brady*, 316 U.S. 455 42
Blackledge v. *Perry*, 417 U.S. 21 25
Burr, Ex parte, 22 U.S. (9 Wheat.) 529 35
Chandler v. *Fretag*, 348 U.S. 3 42
Chapman v. *California*, 386 U.S. 18 28
Cintolo v. *United States*, cert. denied, No. 82-1383 (May 31, 1983) 34
Cobbledick v. *United States*, 309 U.S. 323 ..... 11, 16, 17, 21, 22, 36
Codispoti v. *Pennsylvania*, 418 U.S. 506 24
Cogen v. *United States*, 278 U.S. 221 21
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 ..... 10, 11, 14, 31
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 ..... 14, 26, 29, 30
Cuyler v. *Sullivan*, 446 U.S. 335 ..... 13, 38, 47, 50, 55, 63
DiBella v. *United States*, 369 U.S. 121 ..... 16, 21
Dombrowski v. *Eastland*, 387 U.S. 82 23
Douglas v. *Alabama*, 380 U.S. 415 24
Emle Industries, Inc. v. *Patentex, Inc.*, 478 F.2d 562 57
Faretta v. *California*, 422 U.S. 806 ..... 39-40, 41, 60

Cases—Continued Page

Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 ..... 16, 27, 35
Ford v. *United States*, 379 U.S. 123 58
Gannett Co. v. *DePasquale*, 443 U.S. 368, 427-429 .. 63, 64
Gideon v. *Wainwright*, 372 U.S. 335 ..... 28, 43
Glasser v. *United States*, 315 U.S. 60 ..... 12, 27, 47
Gutierrez v. *Waterman S.S. Corp.*, 373 U.S. 206 15
Heike v. *United States*, 217 U.S. 423 21
Helstoski v. *Meanor*, 442 U.S. 500 ..... 9, 19, 20, 23
Holloway v. *Arkansas*, 435 U.S. 475 47
John Doe Corp. v. *United States*, No. 82-5611 (6th Cir. July 21, 1983) 26
Johnson v. *Zerbst*, 304 U.S. 458 ..... 39, 63
Jones v. *Barnes*, No. 81-1794 (July 5, 1983) 38
La Buy v. *Howes Leather Co.*, 352 U.S. 249 35
Leis v. *Flynt*, 439 U.S. 438 45
Linton v. *Perini*, 656 F.2d 207, cert. denied, 454 U.S. 1162 ..... 39, 43
Ludwig v. *Massachusetts*, 427 U.S. 618 24
Middlesex Ethics Committee v. *Garden State Bar Ass'n*, 457 U.S. 423 61
Morris v. *Slappy*, No. 81-1095 (Apr. 20, 1983) 11, 33, 38
Murphy v. *Hunt*, 455 U.S. 478 27
NCK Organization Ltd. v. *Bregman*, 542 F.2d 128 .. 57
Nixon v. *Fitzgerald*, No. 79-1738 (June 24, 1982) .. 15
Offutt v. *United States*, 348 U.S. 11 63
Payne v. *Arkansas*, 356 U.S. 560 28
Pointer v. *Texas*, 380 U.S. 400 24
Powell v. *Alabama*, 287 U.S. 45 ..... 12, 40, 41, 42
Price v. *Georgia*, 398 U.S. 323 23
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 ..... 60, 63
Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 21
Schlagenhauf v. *Holder*, 379 U.S. 104 35
Shanferoke Coal & Supply Corp. v. *Westchester Service Corp.*, 293 U.S. 449 15
Singer v. *United States*, 380 U.S. 24 60
Smith v. *Illinois*, 390 U.S. 129 24
Stack v. *Boyle*, 342 U.S. 1 ..... 9, 10, 11, 19, 30
T.C. & Theatre Corp. v. *Warner Brothers Pictures*, 113 F. Supp. 265 57

Cases—Continued Page

Tumey v. *Ohio*, 273 U.S. 510 28
Ungar v. *Sarafite*, 376 U.S. 575 ..... 12, 34, 42, 44
United States v. *Agosto*, 675 F.2d 965, cert. denied, after remand and subsequent affirmance *sub nom.* *Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982) 15, 34, 39, 43, 45, 47
United States v. *Alvarez*, 696 F.2d 1307 31
United States v. *Armedo-Sarmiento*, 524 F.2d 591 .. 39, 59
United States v. *Ash*, 413 U.S. 300 39
United States v. *Bertolini*, 576 F.2d 1133 44
United States v. *Bird*, No. 83-2261 (5th Cir. July 11, 1983) 25
United States v. *Brewster*, 408 U.S. 501 20
United States v. *Burton*, 584 F.2d 485, cert. denied, 439 U.S. 1069 ..... 39, 43, 44
United States v. *Butterworth*, 693 F.2d 99 26
United States v. *Buttorff*, 572 F.2d 619, cert. denied, 437 U.S. 906 44
United States v. *Caggiano*, 660 F.2d 184, cert. denied, 454 U.S. 1149 29
United States v. *Curcio*, 680 F.2d 881 ..... 47, 59
United States v. *Curcio*, 694 F.2d 14 15
United States v. *Davis*, 604 F.2d 474 44
United States v. *DeFillipo*, 590 F.2d 1228, cert. denied, 442 U.S. 920 49
United States v. *DiFrancesco*, 449 U.S. 117 29
United States v. *Dinitz*, 424 U.S. 600 ..... 12, 45
United States v. *Dinitz*, 538 F.2d 1214, cert. denied, 429 U.S. 1104 ..... 39, 46
United States v. *Dolan*, 570 F.2d 1177 ..... 6, 15, 42-43, 46, 47, 59, 62
United States v. *Elrod*, No. 82-2063 (7th Cir. Aug. 19, 1983) 30, 61, 62
United States v. *Gaines*, 529 F.2d 1038 ..... 39, 43
United States v. *Garcia*, 517 F.2d 272 ..... 15, 59
United States v. *Garcia*, 589 F.2d 249, cert. denied, 442 U.S. 909 26
United States v. *Garner*, 632 F.2d 758, cert. denied, 450 U.S. 923 26
United States v. *Greger*, 657 F.2d 1109, cert. denied, No. 81-1357 (May 2, 1983) 15, 27

Cases—Continued Page

United States v. *Grismore*, 546 F.2d 844 44
United States v. *Hinderman*, 528 F.2d 100 44-45
United States v. *Hobson*, 672 F.2d 825, cert. denied, No. 82-57 (Oct. 12, 1982) 15, 34, 43, 46, 59
United States v. *Hollywood Motor Car Co.*, No. 81-1144 (June 28, 1982) ..... *passim*
United States v. *Inman*, 483 F.2d 738, cert. denied, 416 U.S. 988 ..... 39, 43, 44
United States v. *Johnson*, 383 U.S. 169 20
United States v. *Kelley*, 539 F.2d 1199, cert. denied, 429 U.S. 963 40
United States v. *Kitchin*, 592 F.2d 900, cert. denied, 444 U.S. 843 ..... 43, 46, 56-57
United States v. *Laura*, 607 F.2d 52 39
United States v. *Layton*, 645 F.2d 681, cert. denied, 452 U.S. 972 26
United States v. *Linton*, 655 F.2d 930, cert. denied, 451 U.S. 912 26
United States v. *Litman*, 661 F.2d 17, cert. denied, 454 U.S. 1150 26
United States v. *MacDonald*, 435 U.S. 850 ..... 10, 19, 20, 21, 24, 29, 32, 33
United States v. *Martin*, 620 F.2d 237, cert. denied, 449 U.S. 890 24
United States v. *Mers*, 701 F.2d 1321 31
United States v. *Mari*, 526 F.2d 117 62
United States v. *Morrison*, 449 U.S. 361 ..... 11, 27, 39, 41
United States v. *Nixon*, 418 U.S. 683 15
United States v. *Ostrer*, 597 F.2d 337 42
United States v. *Peister*, 631 F.2d 658, cert. denied, 449 U.S. 1126 43
United States v. *Phillips*, 699 F.2d 798 ..... 15, 47
United States v. *Poulack*, 556 F.2d 83, cert. denied, 434 U.S. 986 ..... 42, 44
United States v. *Provenzano*, 620 F.2d 985, cert. denied, 449 U.S. 899 ..... 34, 56
United States v. *Reese*, 699 F.2d 803 59
United States v. *Ryan*, 402 U.S. 530 ..... 18, 21
United States v. *Smith*, 464 F.2d 194, cert. denied, 409 U.S. 1066 44
United States v. *Smith*, 653 F.2d 126 15

Cases—Continued: Page

United States v. *Sorren*, 605 F.2d 1211 26
United States v. *Taylor*, 569 F.2d 448, cert. denied, 435 U.S. 952 44
United States v. *Vargas-Martinez*, 569 F.2d 1102 43
United States v. *Vowteras*, 500 F.2d 1210, cert. denied, 419 U.S. 1069 62
United States v. *White*, 451 F.2d 1225 44
United States v. *Wilhelm*, 570 F.2d 461 ..... 40, 44
United States ex rel. Carey v. *Rundle*, 409 F.2d 1210 44
Wall, Ex parte, 107 U.S. 265 45
Westinghouse Electric Corp. v. *Gulf Oil Corp.*, 588 F.2d 221 57
Will v. *United States*, 389 U.S. 90 35
Wood v. *Georgia*, 450 U.S. 261 ..... 49, 50

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 6 cl. 1 23
Amend. I, Speech or Debate Clause 19, 20, 23
Amend. IV 32
Amend. V 1, 49
Double Jeopardy Clause 19, 20, 23, 24
Due Process Clause 10, 12, 22-23, 25, 26, 41, 42
Amend. VI ..... *passim*
Assistance of Counsel Clause 10, 11, 22, 25, 38, 39
Speedy Trial Clause 21, 24
Amend. XIV, Due Process Clause 41
Criminal Justice Act, 18 U.S.C. 3006A(b) 49
18 U.S.C. 241 2
18 U.S.C. 242 2
18 U.S.C. 2518(10)(b) 18
18 U.S.C. 3147(b) 18, 19
18 U.S.C. 3731 ..... 18, 29
28 U.S.C. 1254(1) 15
28 U.S.C. 1291 ..... 9, 14, 16, 17, 19
28 U.S.C. 1292(b) 17, 18
28 U.S.C. 1654 45
28 U.S.C. 2111 28

Constitution, statutes and rules—Continued: Page

Fed. R. App. P.:
Rule 3(c) 36
Rule 11(a) 36
Rule 12(a) 36
Rule 21(a) 35
Rule 21(b) 35
Rule 23(b) 35
Rule 31(a) 36

Fed. R. Crim. P.:
Rule 2 64
Rule 11(f) 64
Rule 44(c) ..... *passim*
Rule 52(a) 28

Sup. Ct. R.:
Rule 5 45
Rule 6 45

E.D. Pa. R. 7 53

Miscellaneous:

Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J. Crim. L. & Criminology 226 (1977) 49, 64

Developments in the Law, *Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. No. 6, 1244 (Apr. 1981) 49, 50, 51, 64

77 F.R.D. 594 ..... 13, 49, 53, 54, 56, 61, 62

Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119 (1978) 13, 49, 50, 51, 61, 64

Judd, *Conflicts of Interest—A Trial Judge's Notes*, 44 Fordham L. Rev. 1097 (1976) 46, 50

Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939 (1978) .. 49, 50

Matt. 6:24 47

Model Code of Professional Responsibility (1980):
Canon 4 57
Canon 9:
EC 2-32 58
DR 5-105(C) 6, 13, 22, 33, 46, 51, 52, 54

Miscellaneous—Continued: Page

Model Rules of Professional Conduct Rule 1.7, 52 U.S.L.W. 1 (Aug. 16, 1983) 22, 33, 52, 54
J. Moore, B. Ward & J. Lucas, 9 *Moore's Federal Practice* (2d ed. 1982) 36
Philadelphia Daily News, Mar. 23, 1983 59
Standards Relating to the Defense Function § 3.5 (b) (1980) 6, 13, 33, 52, 54
R. Stern & E. Gressman, *Supreme Court Practice* 459 (5th ed. 1978) 15

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-374

ROBERT FLANAGAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A11) is reported at 679 F.2d 1072.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1982 (Pet. App. A32-A33), and a petition for rehearing was denied on July 12, 1982 (Pet. App. A34-A35). The petition for a writ of certiorari was filed on September 1, 1982, and was granted on January 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). There is a substantial question regarding the jurisdiction of the court of appeals, and therefore of this Court, which is fully discussed in the argument section of this brief.

CONSTITUTIONAL PROVISIONS AND RULE OF PROCEDURE INVOLVED

Applicable provisions of the Fifth and Sixth Amendments to the United States Constitution are set out at

Pet. 3. Fed. R. Crim. P. 44(c) provides, in pertinent part:

> Whenever two or more defendants have been jointly charged * * * or have been joined for trial * * *, and are represented by the same retained or assigned counsel * * *, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

STATEMENT

Petitioners are police officers in the Philadelphia Police Department, where they were members of a so-called "grandpop" squad. Petitioner Flanagan, "posing as an aged derelict," served as a decoy to attract street criminals (J.A. A16). The remaining petitioners hid out of view until Flanagan gave the standard alarm, "give me back my money," at which time they would move in and make an arrest (J.A. A16-A17).

On September 10, 1981, a federal grand jury sitting in the Eastern District of Pennsylvania returned a 13-count indictment against petitioners. Count I charged all petitioners with conspiring to violate the civil rights of citizens, in violation of 18 U.S.C. 241 (J.A. A4-A9). The succeeding counts charged petitioners, in varying combinations, with substantive civil rights offenses, in violation of 18 U.S.C. 242 (J.A. A9-A14).[1] The indictment alleged that, in the course of their activities on the grandpop squad, pe-

[1] Petitioners Flanagan and McNamee were charged in all 12 substantive counts, Landis in 11 substantive counts, and Keweshan in 10 substantive counts (J.A. A9-A14).

titioners had conspired to arrest persons without probable cause and had illegally arrested or physically abused eight people (J.A. A4-A14).

1. Following arraignment, petitioners, through counsel Sprague & Rubenstone, filed a number of pretrial motions, including a motion by petitioner Flanagan's three co-defendants to sever their case from his (J.A. A15-A18). They claimed that from their places of hiding they were "not privileged" to what occurred between Flanagan and the supposed street criminal prior to receiving the signal for assistance, that the "vast majority" of the government's evidence—of which they claim little or no knowledge—related to what transpired between Flanagan and the various individuals arrested, and that, given the "gross disparity" in the quantum of inculpatory evidence, severance was required to protect them against prejudicial spillover (J.A. A17-A18, A20). In response, the government answered petitioners' allegations and moved for a hearing under Rule 44(c) of the Federal Rules of Criminal Procedure regarding Sprague & Rubenstone's multiple representation of petitioners.

At the conclusion of the Rule 44(c) hearing, and following the completion of supplementary briefing requested by the court, the district court disqualified Sprague & Rubenstone from representing any of the petitioners. The court's ruling was not based on the inherent evils of multiple representation, but rather on the particular facts of this case, especially as reflected in petitioners' own pretrial motions and supporting memoranda. Disqualification was required, the court concluded, because the "potential for conflict here is overwhelming" (Pet. App. A18).[2]

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[2] As the court stated at the hearing (Pet. App. A40): "The potential for conflict just jumps out in this case and I just don't know how counsel could even undertake, under the cir-

The court first noted that the four petitioners were not all charged in each count of the indictment, reflecting that the involvement of each "may vary significantly from that of the others" (Pet. App. A16-A17). Indeed, the court observed that petitioners had moved to dismiss the conspiracy count against them on the ground that, because of the differences in each petitioner's role in the particular arrests, there was no single conspiracy and each allegedly illegal arrest must have been the product of a separate agreement (*id.* at A17-A18).

In addition, the court noted that defense counsel had acknowledged that this was a complex case, likely to turn on circumstantial evidence relating to each petitioner's state of mind, and that oral statements made by petitioners will be essential to prove their requisite state of mind. This factor alone, the court reasoned, created a serious potential conflict of interest because "joint counsel's obligation to preserve the confidences of one defendant could severely hamper the cross-examination of any hearsay witness as to another defendant" (Pet. App. A18).

The court concluded that "[t]he most glaring evidence of the potential for conflict which may arise if all defendants are represented jointly is found in defendants Keweshan, Landis and McNamee's motion for severance, and the accompanying memorandum of law" (Pet. App. A18). There, the court noted, those three petitioners claimed that they would be "severely prejudiced" if they were tried together with petitioner Flanagan, because it was upon Flanagan's information and signal that they relied in making arrests (Pet. App. A19-A20). The court reasoned that joint representation would gravely prejudice petitioners'

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cumstances, to attempt to represent all four of these defendants." See also *id.* at A55, A59, A68, A74.

interests because of "joint counsel's possible inability to distance Keweshan, Landis and McNamee from Flanagan" (Pet. App. A20).[3]

Notwithstanding the serious difficulties posed by joint representation in this case, the district court found that each petitioner had voluntarily, knowingly, and intelligently decided to waive all objections to joint representation (Pet. App. A16, A20).[4] The court therefore addressed a question it had requested the parties to brief following the Rule 44(c) hearing: whether it possessed the authority to require separate counsel notwithstanding petitioners' waivers of their right to separate counsel (Pet. App. A16). The court concluded that it had such authority.

The court noted that the established standards of the legal profession prohibit a lawyer's representa-

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[3] The district court also discussed other ways in which a conflict of interest could arise in this case: (1) inability of counsel during opening and closing statements to set one defendant apart from the others; (2) inability of counsel to argue the relative culpability of the defendants at sentencing; (3) the possibility that the jury might infer from the joint representation that if one defendant is guilty, the others are as well; (4) the possibility that, if the government introduces more evidence against petitioner Flanagan than the other three, counsel will unduly concentrate his efforts on defense of Flanagan; and (5) problems arising if the government offers only one defendant immunity in exchange for his testimony, or if some but not all of the petitioners choose to testify or to introduce character or reputation evidence (Pet. App. A14-A15).

[4] During the course of the Rule 44(c) hearing, petitioners disclosed that their legal expenses were being paid by the Fraternal Order of Police (Pet. App. A49, A54, A59, A64). The court thereafter informed petitioners that separate counsel would, if necessary, be appointed at public expense, and petitioners acknowledged that they were aware of such a possibility (*ibid.*). Accordingly, the district court found that petitioners' waiver of conflict-free counsel was made "without financial pressure" (Pet. App. A16).

tion of multiple criminal defendants—even where the clients consent—unless it is "obvious that he can adequately represent the interest of each" and it is "clear that no conflict is likely to develop" (Pet. App. A23-A24, A26, quoting Model Code of Professional Responsibility DR 5-105(C) (1980), and Standards Relating to the Defense Function § 3.5(b) (1980)). The district court stressed that not only does an attorney's representation of conflicting interests violate professional ethics, it also " 'invites disrespect for the integrity of the court' " and is " 'detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court' " (Pet. App. A24, quoting *United States* v. *Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978)).

The court rejected petitioners' contention that counsel may be disqualified only when an "actual" conflict of interest is found (Pet. App. A24-A25). Rather, it observed (*id.* at A25) that, by the terms of Fed. R. Crim. P. 44(c), it was required to take appropriate action in advance of trial "[u]nless it appears that there is good cause to believe no conflict of interest is likely to arise." And, while the court ruled that disqualification of a defendant's chosen counsel would be inappropriate if the potential for a conflict of interest were a matter of "mere speculation," it held that it had the discretion to anticipate the conflict and disqualify counsel "where the likelihood is great that a potential conflict may escalate into an actual conflict" (Pet. App. A27). The district court therefore issued an order disqualifying Sprague & Rubenstone from representing any of the four petitioners.[5]

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[5] The court disqualified the firm from representing any of the four petitioners in reliance on the well-settled presumption

2. The court of appeals affirmed (Pet. App. A1-A11). The court noted that the district court's disqualification order was entered pursuant to Fed. R. Crim. P. 44(c), and that to reverse the order it would "have to find either that there is good cause to believe that no conflict of interest is likely to arise, or that the measures taken were an abuse of discretion" (Pet. App. A5-A6). It found neither.

Like the district court, the court of appeals analyzed petitioners' pretrial pleadings as well as the likely course of the pending trial in surveying the conflicts of interest that would arise from Sprague & Rubenstone's joint representation of petitioners. The court pointed out that petitioners had moved to dismiss the conspiracy count because of their differing involvement in the substantive counts and noted that three of the petitioners had requested a severance from petitioner Flanagan because of the "prejudice [that] would arise if they were forced to stand trial with him" (Pet. App. A6). The court concluded that these factors, as well as others, "indicate conflicts that joint defense counsel will very likely face in presenting an adequate defense for each defendant" (*ibid.*), and fully justify the district court's order. While a "defendant's choice of counsel is not to be dealt with lightly or arbitrarily" and "should not be interfered with in cases where potential conflicts of interest are highly speculative," where "the materialization of actual conflict is very likely, disqualification of defense counsel and ordering defendants to retain separate counsel are appropriate measures to be taken

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that privileged information had been acquired from each petitioner in the course of the attorney-client relationships. In these circumstances, the court concluded, allowing Sprague & Rubenstone to represent one of the petitioners would be unfair to the other three. See Pet. App. A16 n.1(a).

pursuant to Fed. R. Crim. P. 44(c)" (Pet. App. A10).[6]

The court held that neither the Sixth Amendment right to assistance of counsel nor petitioners' ability to waive their right to conflict-free counsel altered the above conclusion. The Constitution, the court reasoned, does not provide defendants with an absolute right to the lawyer of their choice (Pet. App. A8). And, while petitioners undoubtedly possess the right to separate representation free from potential conflicts of interest, it does not follow that by waiving that right they are absolutely entitled to representation by counsel burdened with a conflict (*id.* at A8-A9).[7] The court noted that the judiciary has an interest independent of that of a criminal defendant in maintaining respect for the integrity of trial court

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[6] The court held that the district court did not err in preventing Sprague & Rubenstone from representing any one of the petitioners (Pet. App. A11). While complete disqualification may not be required in every case in which a conflict is likely to arise, the court found that the question was committed to the sound discretion of the district court under Fed. R. Crim. P. 44(c). The court concluded that the district court had not abused that discretion by ordering complete disqualification in this case because of the significant potential for conflict in the firm's receipt of confidential information from each of the petitioners, which might be used in the course of defending one to the detriment of the others (Pet. App. A11).

[7] The government had urged in the court of appeals, as an alternative ground supporting the judgment, that petitioners' waivers of conflict-free counsel were not intelligent and knowing. Although the court of appeals noted that the trial court had questioned whether the law firm was even in a position to advise the defendants fully concerning the possible conflicts of interest in this case (Pet. App. A10), it declined to address the government's alternative argument because it affirmed the district court's conclusion that, in the circumstances of this case, disqualification of counsel was proper notwithstanding petitioners' possible waiver.

proceedings, which extends to preventing a serious breach of professional ethics (*id.* at A9-A10). Because petitioners did not even dispute that a conflict of interest was very likely to arise in this case (*id.* at A10; see also *id.* at A6), the court of appeals concluded that the district court did not err in requiring separate counsel.[8]

SUMMARY OF ARGUMENT

1. The district court's disqualification order is not appealable prior to trial. The jurisdiction of the courts of appeals is limited to "final decisions of the district courts" (28 U.S.C. 1291), and a disqualification order in a criminal case does not fall within that small category of "collateral orders" that, notwithstanding their interlocutory nature, require pretrial appellate review. This Court has generally been cautious in delineating the reach of the collateral order doctrine, especially in the case of attempted pretrial appeals by criminal defendants, which jeopardize the substantial public interest in the speedy resolution of criminal charges. See *Barker* v. *Wingo*, 407 U.S. 514, 519-521 (1972). Indeed, interlocutory appeals by criminal defendants have been found to be appropriate in only the most pressing circumstances: where, among other things, denial of such review would violate a constitutional right "not to be tried" (*Abney* v. *United States*, 431 U.S. 651 (1977); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979)), or where denial of immediate review would render impossible any review whatsoever of a matter entirely collateral to the trial itself (*Stack* v. *Boyle*, 342 U.S. 1 (1951)). Orders

[8] The court of appeals stayed its mandate to and including September 19, 1982, to permit the filing of a petition for a writ of certiorari. We have been informed by the United States Attorney that no trial date has been set pending this Court's disposition of the case.

disqualifying defense counsel meet none of these established criteria.

Petitioners' asserted right to be represented by counsel of their choice, whether grounded on the Sixth Amendment's Assistance of Counsel Clause or the Fifth Amendment's Due Process Clause, does not embody a "right not to be tried" in the absence of desired counsel. Although the Sixth Amendment provides a defendant with a number of discrete rights, there is no textual indication on the face of the Amendment that the full enjoyment of those rights requires interlocutory appellate oversight. See *United States* v. *MacDonald*, 435 U.S. 850, 860 (1978). The same is true of any possible due process claim to counsel of choice. An asserted denial of due process "is simply not [a right] that must be upheld prior to trial if it is to be enjoyed at all." *United States* v. *Hollywood Motor Car Co.*, No. 81-1144 (June 28, 1982), slip op. 6 (footnote omitted).

A disqualification order, moreover, unlike an order regarding bail (*Stack* v. *Boyle*, *supra*), does not become moot upon final judgment. Such an order can be effectively reviewed by an appellate court following final judgment and, in the same manner as a multitude of other trial court rulings, may provide the basis for a reversal and retrial should a defendant show that an erroneous disqualification prejudiced his defense.

Finally, there are compelling doctrinal and prudential considerations that militate against interlocutory appeal of the order in this case. The "collateral order" doctrine, as originally conceived, extended only to that "small class" of important interlocutory orders that were completely separable from the merits of pending litigation. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). A disqualification order, however, cannot "be reviewed

without halting the main trial" (*Stack* v. *Boyle*, 342 U.S. at 12 (opinion of Jackson, J.)). This interlocutory review, furthermore, requires searching consideration of the merits of the criminal prosecution: the appellate court's review in this case, for example, depended upon the petitioners' own pretrial pleadings regarding the validity of their indictment and the propriety of a joint trial. Such expansion of the *Cohen* doctrine beyond truly collateral matters cannot be justified simply on the ground that the right asserted by petitioners is "important." Should the Court conclude that the relative value of the right asserted by petitioners is great enough to warrant interlocutory review, "numerous other questions would fall under such [an analysis], and the policy against piecemeal appeal in criminal cases would be swallowed by ever-multiplying exceptions." *Hollywood Motor Car Co.*, slip op. 7. Rather than begin down that slippery slope, the Court should adhere to traditional notions of finality, which include the possibility of mandamus in appropriate cases. Finality is more than a mere "technical concept"; it is also "the means for achieving a healthy legal system." *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940).

2. If the Court concludes that pretrial disqualification orders are immediately appealable, it should affirm the decision of the court of appeals. Contrary to petitioners' assumption, the Sixth Amendment does not guarantee a defendant the right to the services of a particular lawyer. Rather, the dictates of the Assistance of Counsel Clause are satisfied so long as a defendant receives the effective assistance of some attorney. *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 12; *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). To the extent that the Constitution grants a defendant the right to demand representation by a specific attorney, a more arguable

doctrinal source of that right would be the Due Process Clause, not the Sixth Amendment. But, whatever the foundation for petitioners' claimed right to counsel of choice, that right is plainly not absolute—the Constitution, at most, proscribes arbitrary or unreasonable interference with a defendant's selection of counsel. *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932).

Every court of appeals has expressly held, and the decisions of this Court clearly demonstrate, that any right to counsel of choice is not absolute. For example, a trial court has discretion to deny a continuance—even when such a course of action will interfere with a defendant's desire to be represented by a particular attorney. *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). The courts have also consistently held that an indigent is not entitled to the appointment of a particular attorney, nor can a defendant be represented by a layman. Similarly, a defendant has no absolute right to insist on being represented by a lawyer who is not admitted to practice before the court conducting his trial or hearing his appeal. But most importantly, it has been repeatedly recognized that a defendant may not insist upon the services of a particular lawyer where such representation would be contrary to established norms of professional legal conduct. See *United States* v. *Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring).

While there is no flat prohibition on multiple representation of defendants in criminal cases, this Court has recognized for decades the inherent evils of multiple representation. *Glasser* v. *United States*, 315 U.S. 60 (1942). And, as described and analyzed by numerous legal scholars and commentators, the dangers of such joint representation are both ubiquitous and insidious. Accordingly, some experts have called for a complete ban on joint representation in criminal

cases, See, *e.g.*, Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119, 157-162 (1978). Although the organized bar has not yet taken a stance as strict as that just suggested, it has proscribed joint representation unless "it is obvious that [the lawyer] can adequately represent the interest of each [client]" and it is "clear that no conflict is likely to develop" (Model Code of Professional Responsibility DR 5-105 (C) (1980); Standards Relating to the Defense Function § 3.5(b) (1980)).

The district court and court of appeals, after applying the ABA standards set out above, correctly concluded that Sprague & Rubenstone's continued multiple representation of petitioners would violate established ethical norms. Pretrial pleadings drafted by counsel expressly rely on the differing interests of petitioners in requesting modification of the indictment and a severance, and plainly demonstrate that petitioners' interests have "diverge[d] [not only] with respect to a material factual or legal issue," but also as to "a course of action." *Cuyler* v. *Sullivan*, 446 U.S. 335, 356 n.3 (1980) (opinion of Marshall, J.). In these circumstances, the conflicts that inhere in Sprague & Rubenstone's joint representation of petitioners are more than mere speculation, and the disqualification order entered was fully justified. See Rule 44(c) Advisory Committee Note, 77 F.R.D. 594, 600-603 (1978).

Petitioners' undoubted entitlement to present a common defense does not alter the propriety of the disqualification order in this case. The decision below does not impugn petitioners' right to present a common defense; it merely insures that any decision to

do so is untainted by conflicts of interest. Similarly, the fact that a waiver of the right to conflict-free counsel might be effective to bar a subsequent ineffective assistance of counsel claim does not establish an affirmative right to insist that the trial court countenance professional conduct falling below accepted ethical norms. While petitioners may abjure their own rights to separate counsel, they cannot "waive" the strong and independent public interest in the fairness of criminal trials and the integrity of the legal profession.

ARGUMENT

I. A PRETRIAL ORDER DISQUALIFYING DEFENSE COUNSEL IN A CRIMINAL CASE IS NOT AN IMMEDIATELY APPEALABLE "FINAL DECISION" WITHIN THE MEANING OF 28 U.S.C. 1291

Congress has limited the jurisdiction of the courts of appeals to "final decisions of the district courts." 28 U.S.C. 1291. In the context of a criminal prosecution, the statute contemplates appellate review only following conviction and the imposition of sentence. See *United States* v. *Hollywood Motor Car Co.*, No. 81-1144 (June 28, 1982), slip op. 2.[9] A narrow exception to the final judgment rule, however, permits interlocutory appellate review of so-called "collateral orders." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949). To qualify, such an order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)

[9] "Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman* v. *United States*, 302 U.S. 211, 212 (1937).

(footnote omitted); *Hollwood Motor Car Co.*, slip op. 2. We submit that the disqualification order entered by the district court does not fall within the "collateral order" exception.[10] If the Court agrees, the appropriate course is to vacate the judgment of the court of appeals and remand with instructions to dismiss the appeal.[11] See, *e.g.*, *Hollywood Motor Car Co.*,

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[10] The courts of appeals are divided on the question whether a pretrial order disqualifying defense counsel in a criminal case is immediately appealable. Six circuits have held such orders to be immediately appealable, although generally without any substantial analysis of the issue. *United States* v. *Curcio*, 694 F.2d 14, 19-20 (2d Cir. 1982) (recognizing that "the point is not free from difficulty," but adhering to a pre-*Hollywood Motor Car Co.* Second Circuit opinion that, without discussion, held such orders appealable); *United States* v. *Dolan*, 570 F.2d 1177, 1180 n.3 (3d Cir. 1978); *United States* v. *Garcia*, 517 F.2d 272, 275 (5th Cir. 1975); *United States* v. *Phillips*, 699 F.2d 798, 801 (6th Cir. 1983); *United States* v. *Agosto*, 675 F.2d 965, 968 n.1 (8th Cir.), cert. denied after remand and subsequent affirmance *sub nom. Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982); *United States* v. *Hobson*, 672 F.2d 825, 826 (11th Cir.), cert. denied, No. 82-57 (Oct. 12, 1982). See also *United States* v. *Smith*, 653 F.2d 126 (4th Cir. 1981) (entertaining pretrial appeal; appealability issue not addressed). The Ninth Circuit has held that such orders are not immediately appealable. *United States* v. *Greger*, 657 F.2d 1109, 1110-1113 (1981), cert. denied, No. 81-1357 (May 2, 1983).

[11] Unless the district court's order disqualifying counsel is held appealable, this Court lacks jurisdiction to reach the merits. 28 U.S.C. 1254(1); *Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982), slip op. 9-11; *United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974). Because appealability is a jurisdictional matter, the Court should address it even though it was not argued by the parties before the court of appeals. See, *e.g.*, *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 209 (1963); *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449, 451-452 (1935). See generally R. Stern & E. Gressman, *Supreme Court Practice* 459 (5th ed. 1978). In the

slip op. 7; *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379-380 (1981).[12]

A. Interlocutory Appeals Have Been Found Appropriate In Only A Few Discrete And Strictly Limited Categories Of Criminal Cases

"Finality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940). Just last Term, the Court noted that "the policy of Congress embodied in [28 U.S.C. 1291] is inimical to piecemeal appellate review." *Hollywood Motor Car Co.*, slip op. 2. This policy, moreover, "is at its strongest in the field of criminal law." *Ibid.* " 'The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment * * *. This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases.' " *Ibid.*, quoting *DiBella* v. *United States*, 369 U.S. 121, 124 (1962). Indeed, because "encouragement of delay is fatal to the vindication of the criminal law" (*Cobbledick*, 309 U.S. at 325), the Court has been loath to create exceptions to the finality requirement of 28 U.S.C. 1291: "Bearing the discomfiture and cost of a prosecution for crime

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instant case, the court of appeals raised the issue of appealability sua sponte. Pet. App. A5 n.1.

[12] In *Firestone Tire*, the Court held that orders *denying* motions to disqualify counsel in *civil* cases are not immediately appealable. The Court took no position on whether orders granting motions to disqualify counsel in civil cases would be appealable under 28 U.S.C. 1291, nor did it express any view regarding the appealability of such orders in criminal cases. 449 U.S. at 372 n.8.

even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick*, 309 U.S. at 325-326.

Despite the possible severity of 28 U.S.C. 1291's finality requirement in particular cases, the wisdom of insisting upon a final judgment prior to the invocation of appellate review in the vast majority of criminal prosecutions becomes obvious upon even perfunctory analysis. Every federal criminal prosecution presents a multitude of questions requiring resolution by the trial court. Does the indictment state an offense? Is the statute constitutional on its face or as applied to the defendant's conduct? Is particular evidence admissible? Has the accused voluntarily waived one or more of his procedural or constitutional rights? The answers to these or other questions—any one of which may involve important constitutional issues—will undoubtedly impact the ultimate course of the litigation, in some cases decisively. But if each important constitutional question were resolved in a separate appeal before trial, litigation could be interminable. There is a compelling societal interest both in the swift punishment of the guilty and in the prompt exoneration of the innocent. See *Barker* v. *Wingo*, 407 U.S. 514, 519-521 (1972). The aphorism that "justice delayed is justice denied" applies with special force to criminal cases.

In recognition of the above considerations, Congress has specifically provided for only a few, strictly limited exceptions to the final judgment rule,[13] and this

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[13] There are two principal express statutory exceptions to the final judgment requirement. First, 28 U.S.C. 1292(b) allows interlocutory appeals in civil cases by permission of the district

Court has consistently refused to countenance interlocutory appeals by criminal defendants except in a very few situations in which, among other things, the damage to the right assertedly denied by the trial court's order would be irreparable in the absence of an interlocutory appeal. The Court, in fact, has departed from the final judgment rule only where "denial of immediate review would render impossible any review whatsoever" (*United States* v. *Ryan*, 402 U.S. 530, 533 (1971)) because " 'the legal and practical value of [the asserted right] would be destroyed if it were not vindicated before trial.' " *Hollywood Motor*

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court and the court of appeals, but only where resolution of a controlling question of law may materially advance the ultimate termination of the litigation. Significant for present purposes is that Congress elected to exclude criminal cases from Section 1292(b).

Second, Congress has in recent years adopted a liberal attitude toward allowance of interlocutory *prosecution* appeals in criminal cases (*e.g.*, 18 U.S.C. 2518(10)(b) and 3731). The reasons for this policy are evident. Because of the operation of double jeopardy principles, erroneous pretrial rulings adverse to the government will almost always be unreviewable following final judgment. In addition, institutional constraints (including the requirement that any government appeal be authorized by the Solicitor General) greatly reduce the risk of frivolous appeals or appeals taken for the purpose of delay. Indeed, both provisions cited above require the United States Attorney to certify that the appeal is not being "taken for purposes of delay" and mandate that the appeal be "diligently prosecuted." None of the considerations that support allowance of interlocutory prosecution appeals has force in the vast majority of potential defense interlocutory appeals, and it is therefore not surprising that, except in the purely collateral area of bail (18 U.S.C. 3147(b)), Congress has never expressly authorized interlocutory appeals by criminal defendants. Cf. *Barker* v. *Wingo*, 407 U.S. at 521 (recognizing the greater incentives defendants generally have to seek to delay criminal trials).

Car Co., slip op. 3-4, quoting *United States* v. *MacDonald*, 435 U.S. 850, 860 (1978). There have been only three such occasions.

In *Stack* v. *Boyle*, 342 U.S. 1 (1951), the Court held that a pretrial order denying a motion to reduce bail is immediately appealable because meaningful review of the order setting bail cannot be postponed until appeal from final judgment.[14] At that late date, there would be no effective remedy if an appellate court determined that bail had been denied improperly at the trial and pretrial stages of the case. 342 U.S. at 12 (opinion of Jackson, J.).[15]

In *Abney* v. *United States*, 431 U.S. 651 (1977), and *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), the Court held that pretrial orders denying motions to dismiss on double jeopardy and Speech or Debate Clause grounds are immediately appealable under 28 U.S.C. 1291. In each case, the Court emphasized that the express language of the Constitution creates a "right not to be tried," which must be upheld prior to trial if it is to be enjoyed at all. See *Hollywood Motor Car Co.*, slip op. 4; *MacDonald*, 435 U.S. at 861.

Thus, in *Abney* the Court concluded (431 U.S. at 661-662) that the language of the Double Jeopardy Clause protects a defendant not only against being convicted of an offense after a previous conviction or acquittal for the same offense, but also against being "twice put in jeopardy," *i.e.*, being twice put to trial

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[14] See 18 U.S.C. 3147(b) (embodying holding of *Stack* v. *Boyle*).

[15] A pretrial order with respect to bail, moreover, is truly "collateral" to the criminal prosecution. Unlike most other rulings entered during the course of a criminal proceeding, "an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried" (*Stack* v. *Boyle*, 342 U.S. at 12 (opinion of Jackson, J.)).

for the same offense. Postponing review until final judgment would expose the defendant to a second trial—a principal evil the Double Jeopardy Clause was intended to prevent.[16]

In *Helstoski*, the Court found that a Congressman was entitled to an interlocutory appeal to assert his Speech or Debate Clause privilege in a criminal case. As with the Double Jeopardy Clause, the Court held that the Speech or Debate Clause is intended to prevent not just conviction, but the very questioning of a Congressman at a criminal trial about his legislative acts. Accordingly, because the Clause grants the right—grounded in separation of powers principles—not even to be questioned regarding legislative acts at a criminal trial, the "right protected by the Clause would [be] lost if the appeal [were] postponed." *Hollywood Motor Car Co.*, slip op. 3. See generally *United States* v. *Brewster*, 408 U.S. 501, 505 (1972); *United States* v. *Johnson*, 383 U.S. 169, 173 (1966).

Under the decisions of this Court, therefore, one of the prerequisites for interlocutory appeal of an order in a criminal case is a showing that to delay review until final judgment will foreclose any effective protection of an important right or vitiate a "right not to be tried" that is the essence of a specific constitutional provision. See *MacDonald*, 435 U.S. at 861. An order is not immediately appealable merely because all the facts relevant to its correctness have

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[16] The Court also emphasized the collateral nature of the double jeopardy claim asserted in *Abney*. The Court noted that the particular double jeopardy claim before it was immediately appealable because the "defendant makes no challenge whatsover to the merits of the charge against him," and the "elements of that claim are completely independent of his guilt or innocence" (431 U.S. at 659, 660). Therefore, the double jeopardy claim in *Abney* was "truly collateral to the criminal prosecution itself" (*id.* at 660).

been fully developed,[17] because an immediate appeal would avoid a substantial burden on the defendant,[18] or because interlocutory review " 'will necessarily determine the conduct of the trial and may vitally affect the result.' " *DiBella*, 369 U.S. at 127, quoting *Cogen* v. *United States*, 278 U.S. 221, 223 (1929) (both holding denials of pretrial suppression motions to be nonappealable).[19] Rather, because of the overriding need to avoid delay in criminal proceedings, the validity of the trial court's rulings—even on constitutional claims—must await conviction before " 'reconsideration by an appellate tribunal.' " *Hollywood Motor Car*

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[17] For example, an order denying a motion to dismiss an indictment on grounds of vindictive prosecution is not appealable prior to final judgment, even though no further facts remain to be developed at trial. See *Hollywood Motor Car Co.*, slip op. 3 (Blackmun., J., dissenting). See also *Abney*, 431 U.S. at 663 (no pretrial review of an order denying a motion to dismiss an indictment for failure to state an offense); *Heike* v. *United States*, 217 U.S. 423, 430-431 (1910) (no pretrial review of an order rejecting a defendant's claim of statutory immunity from prosecution).

[18] See, *e.g.*, *Cobbledick*, 309 U.S. at 326 (order denying motion to quash subpoena duces tecum is not immediately appealable; "the requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceeding"); *United States* v. *Ryan*, 402 U.S. at 532-534 (denial of motion to quash subpoena duces tecum is not immediately appealable simply because compliance with the subpoena will impose a substantial burden on respondent; interlocutory review is available "[o]nly in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims").

[19] See also *MacDonald*, 435 U.S. at 863 (no pretrial review of an order denying a motion to dismiss the indictment under the Sixth Amendment's Speedy Trial guarantee); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 29-31 (1943) (no pretrial review of an order refusing to dismiss an indictment for lack of jurisdiction).

Co., slip op. 6 n.2, quoting *Cobbledick*, 309 U.S. at 326. We turn now to the appealability of the instant order.

B. Orders Disqualifying Defense Counsel In Criminal Cases Do Not Meet The Strict Standards Justifying Interlocutory Review

Petitioners claim that the Constitution guarantees them the right to be represented by a particular lawyer of their choice, notwithstanding the fact that such representation may be contrary to established norms of professional legal conduct. See Model Code of Professional Responsibility DR 5-105(C) (1980); Model Rules of Professional Conduct Rule 1.7 (52 U.S.L.W. 1, 7 (Aug. 16, 1983)). As we explain in Part II of this Brief, no decision of this Court has ever recognized such a sweeping right—the Constitution, at most, protects against arbitrary interference with a defendant's selection of counsel. But, even assuming that petitioners' right to counsel is as expansive as they assert, the district court's ruling in this case does not demand immediate appellate attention. An order disqualifying defense counsel in a criminal case does not infringe a "right not to be tried," nor is such an order wholly immune from effective appellate review after final judgment. Such an order, moreover, is hardly "collateral" to the merits of the prosecution—a compelling reason not to depart from traditional considerations of finality. Interlocutory appeal in the circumstances of this case, therefore, is plainly inappropriate.

1. *There is no "right not to be tried" in the absence of the services of a particular lawyer*

Petitioners have cited two provisions of the Constitution in support of their claim that they have a right to be represented by a particular lawyer: the Assistance of Counsel Clause of the Sixth Amendment (Pet. Br. 33-39) and the Due Process Clause of

the Fifth Amendment (Pet. 8). The decisions of this Court make clear, however, that unlike the Double Jeopardy and Speech or Debate Clauses, there is no express or implicit "right not to be tried" in the language of the Clauses cited by petitioners.

The Sixth Amendment guarantees a criminal defendant a number of discrete procedural and substantive rights: a speedy and public trial, an impartial jury of the state and district wherein the crime was committed, information regarding the nature and cause of the accusation, confrontation with the witnesses against him, compulsory process to obtain defense witnesses, and the assistance of counsel. The language of the Amendment does not share the forward looking, pretrial cast of either the Double Jeopardy Clause [20] or the Speech or Debate Clause.[21] Indeed, the express language of the Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy" the rights thereafter enumerated, without the slightest hint that the full enjoyment of those rights requires interlocutory oversight. There is plainly no textual indication on the face of the Amendment that the rights prescribed therein cannot be adequately protected in the normal course of ap-

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[20] In *Abney*, the Court emphasized that the "twice put in jeopardy" language of the Double Jeopardy Clause "relates to a potential, *i.e.*, the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried" (431 U.S. at 661, quoting *Price* v. *Georgia*, 398 U.S. 323, 326 (1970)).

[21] The Speech or Debate Clause expressly provides that "for any Speech or Debate in either House," congressional representatives *"shall not be questioned* in any other Place." U.S. Const. Art. 1, § 6, cl. 1 (emphasis added). The Clause therefore was "designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Helstoski*, 442 U.S. at 508, quoting *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967).

pellate review by setting aside any conviction procured through a prejudicial violation of those rights.

Consistent with the above analysis, the decisions of this and other federal courts have repeatedly denied interlocutory review of district court orders raising Sixth Amendment concerns. At least one court of appeals has rejected an interlocutory appeal that sought to raise an improper venue claim (*United States* v. *Martin*, 620 F.2d 237, 238 (10th Cir.), cert. denied, 449 U.S. 890 (1980)), and this Court's decisions interpreting the Impartial Jury Clause (see, *e.g.*, *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976); *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974)) and Confrontation Clause (see, *e.g.*, *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965)) have likewise never suggested that there is an immediate right to appeal interlocutory orders impacting upon Sixth Amendment rights.[22] Furthermore, in *MacDonald* the Court explicitly held (435 U.S. at 861) that the Speedy Trial Clause of the Sixth Amendment does not afford a criminal defendant the right to an immediate interlocutory appeal of an adverse district court decision: "Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all." Similarly, even assuming that

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[22] Indeed, the fact that objections to a two-tiered jury trial system (*Ludwig*), the denial of a jury trial (*Codispoti*), and the deprivation of cross-examination (*Smith*; *Pointer*; *Douglas*) were all satisfactorily reviewed following the entry of final judgments demonstrates persuasively that there is no compelling need for mid-trial review of Sixth Amendment claims generally.

the Assistance of Counsel Clause of the Sixth Amendment guarantees a right to the services of a particular lawyer, it—like all the other rights secured by the Sixth Amendment—does not embrace a "right not to be tried." [23]

The same is true with respect to district court orders that assertedly violate the Due Process Clause of the Fifth Amendment. In *Hollywood Motor Car Co.* the respondents moved to dismiss the charges against them on the ground that a superseding indictment manifested prosecutorial vindictiveness, citing the due process rule announced in *Blackledge* v. *Perry*, 417 U.S. 21 (1974). The Court, noting the "crucial distinction" between "a right not to be tried" and those constitutional rights that can be adequately vindicated by "the provision of a new trial free of prejudicial error," concluded that an asserted denial of due process "is simply not [a right] that must be upheld prior to trial if it is to be enjoyed at all." *Hollywood Motor Car Co.*, slip op. 5-6 (footnote omitted). It therefore rejected the contention that a claim of prosecutorial vindictiveness creates a right of interlocutory review. The courts of appeals have similarly rejected other attempts to secure immediate review of due process claims.[24] Clearly, then, the language of

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[23] Indeed, rather than encompassing a "right *not* to be tried" without the services of a given lawyer, petitioners' claimed Sixth Amendment right to counsel of choice is more accurately described as a "right *to* be tried" with the assistance of desired counsel. Should that right be infringed, it can be adequately remedied by providing a retrial at which the defendant is represented by desired counsel. Unlike a "right not to be tried," therefore, petitioners' claimed Sixth Amendment right does not require interlocutory review to prevent the right from becoming nugatory.

[24] See, *e.g.*, *United States* v. *Bird*, No. 83-2261 (5th Cir. July 11, 1983), slip op. 5617 (no interlocutory appeal to enforce an

the Due Process Clause does not create a "right not to be tried"—otherwise the contentions presented in cases like *Hollywood Motor Car Co.* would be immediately appealable.[25]

Accordingly, whether petitioners' asserted right to counsel is derived from the Fifth or the Sixth Amendment, it plainly does not include a right to immediate appellate review.

2. The right asserted by petitioners can be adequately protected on appeal from a final judgment

One of the requirements of the "collateral order" doctrine is that the order challenged in a pre-trial appeal must be "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468 (footnote omitted). Apart from *Abney* and *Hel-*

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alleged agreement not to prosecute defendant); *John Doe Corp.* v. *United States*, No. 82-5611 (6th Cir. July 21, 1983), slip op. 5-6 (same); *United States* v. *Butterworth*, 693 F.2d 99, 101 (9th Cir. 1982) (no interlocutory appeal of selective prosecution claim); *United States* v. *Litman*, 661 F.2d 17, 19 (3d Cir. 1981), cert. denied, 454 U.S. 1150 (1982) (no interlocutory appeal of prosecutorial or judicial misconduct); *United States* v. *Sorren*, 605 F.2d 1211, 1214-1215 (1st Cir. 1979) (no interlocutory appeal of personal jurisdiction claim); *United States* v. *Layton*, 645 F.2d 681, 683 (9th Cir.), cert. denied, 452 U.S. 972 (1981) (no interlocutory appeal of subject matter jurisdiction claim). See also *United States* v. *Linton*, 655 F.2d 930, 932 (9th Cir. 1980), cert. denied, 451 U.S. 912 (1981) (no interlocutory appeal to review irregularities in grand jury proceedings); *United States* v. *Garner*, 632 F.2d 758, 766 (9th Cir. 1980), cert. denied, 450 U.S. 923 (1981) (same); *United States* v. *Garcia*, 589 F.2d 249, 252 (5th Cir.) (per curiam), cert. denied, 442 U.S. 909 (1979) (same).

[25] Even a claim of complete immunity from prosecution is not immediately appealable when not based on an interest in protecting the defendant from the trial process itself. *Heike* v. *United States, supra.*

stoski, which involved claims of a constitutional "right not to be tried," this Court has held only one kind of order in a criminal case to be effectively unreviewable on the defendant's appeal from a final judgment of conviction—one regarding bail pending trial. *Stack* v. *Boyle*, *supra*.

The controversy surrounding the issue of bail pending trial, if unreviewed, literally becomes moot by the time of final judgment. *Murphy* v. *Hunt*, 455 U.S. 478 (1982). By contrast, the order in this case can be reviewed after final judgment. If the district court incorrectly disqualified defense counsel, the remedy, if warranted, would be to vacate the conviction and remand for a new trial at which petitioners would be represented by the erroneously disqualified attorney. See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 378 (reversal and new trial if disqualification order proves erroneous "seems plainly adequate should petitioner's concerns of possible injury ultimately prove well founded"). See also *Glasser* v. *United States*, 315 U.S. 60, 87-88 (1942); *United States* v. *Morrison*, 449 U.S. 361, 364-367 (1981).[26] Indeed, waiting until

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[26] In *United States* v. *Greger*, 657 F.2d at 1113, the Ninth Circuit, in the course of holding that pretrial disqualification orders are not immediately appealable collateral orders, suggested that erroneous disqualification orders would warrant automatic reversal of the conviction. We disagree.

As explained in Part II, it is the government's position that the Constitution does not grant a defendant an absolute right to particular counsel of his choice. A defendant's right to select his own counsel cannot override, in all circumstances, the strong public interest in the fair and efficient administration of the criminal justice system. And, contrary to the Ninth Circuit's assumption in *Greger*, 657 F.2d at 1113, should a district court err in balancing these respective concerns, prejudicial error cannot simply be presumed.

To be sure, this Court has held that certain rights are "so basic to a fair trial that their infraction can never be treated

final judgment will substantially improve the quality of appellate review. Following the entry of a final judgment, the court of appeals will have the benefit of the trial record and will therefore be in a better position to determine whether the district court's pretrial decision to disqualify counsel was in fact reason-

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as harmless error." *Chapman* v. *California*, 386 U.S. 18, 23 & n.8 (1967). See, *e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (denial of appointed counsel to indigent felony defendants); *Payne* v. *Arkansas*, 356 U.S. 560 (1958) (admission of coerced confession); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (trial before biased judge). But in each of the above cases the constitutional violation infected the fundamental fairness of the entire proceeding, as well as going to the heart of the truth-finding process of the trial court.

The constitutional right assertedly involved in this case, by contrast, is of a different sort entirely. The disputed order does not deprive petitioners of the effective assistance of counsel—only of the assistance of the firm of Sprague & Rubenstone. The fairness of the trial itself will not be inescapably called into question should the order prove to be erroneous. Moreover, if substitute counsel render effective, competent assistance, any possible error in disqualifying Sprague & Rubenstone would not preclude an appellate court from having confidence in the truth-finding process in the trial court. Automatic reversal accordingly would be inappropriate. See 28 U.S.C. 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties"); Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"). To the extent that disqualified counsel do possess unique skills and abilities, like the ones claimed by counsel in this case (see, *e.g.*, Pet. Br. 4-5), these qualities can be pointed out to the appellate court and evaluated by it in making the determination whether a particular disqualification order, if erroneous, prejudiced a defendant.

able under all the circumstances of the case.[27] Such an approach also conserves scarce appellate resources because, should the defendant be acquitted, there will be no necessity for any appellate review. Thus, delaying review until final judgment will not prevent a court of appeals from remedying an erroneous and prejudicial interference with a defendant's selection of defense counsel, and it will also avoid unnecessary or unduly speculative appellate review. See *MacDonald*, 435 U.S. at 858-859.[28]

3. *Departure from traditional considerations of finality is unwise in the circumstances of this case*

Up to this point, we have concentrated principally upon the third aspect of the collateral order doctrine, as articulated by this Court in *Coopers & Lybrand*, 437 U.S. at 468 (footnote omitted), *i.e.*, that an appealable interlocutory order "be effectively unreviewable on appeal from a final judgment." While, as

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[27] At the conclusion of trial, for example, it will be apparent whether a conflict of interests between particular co-defendants that would preclude joint representation actually did emerge.

[28] While the order in this case is reviewable following final judgment, an order granting a defendant's motion to disqualify *government* counsel presents an entirely different question. Because the government cannot appeal from a final judgment of acquittal (see *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980)), and would have no occasion to appeal from a judgment of conviction, such a district court order is effectively unreviewable on appeal from the final judgment, and therefore is justifiably deemed an immediately appealable collateral order. See generally *United States* v. *Caggiano*, 660 F.2d 184, 189-190 (6th Cir. 1981), cert. denied, 454 U.S. 1149 (1982). Cf. 18 U.S.C. 3731 (authorizing interlocutory prosecution appeals). This conclusion is reinforced by the different policies that bear on interlocutory prosecution appeals as compared to interlocutory defense appeals. See note 13, *supra*.

shown above, this factor conclusively establishes the nonappealability of the disqualification order in this case, it is not the sole consideration militating against interlocutory appeal here. Compelling doctrinal and prudential considerations counsel against expanding the scope of the "collateral order" doctrine to include a disqualification order.

Although an order granting a disqualification motion does, in effect, "conclusively determine" the disqualification question in the trial court (*Coopers & Lybrand*, 437 U.S. at 468), it cannot be said that such a determination is "completely separate from the merits of the action" (*ibid.*). Initially, a disqualification order cannot "be reviewed without halting the main trial." *Stack* v. *Boyle*, 342 U.S. at 12 (opinion of Jackson, J.). This single consideration—especially in the context of a criminal prosecution—militates strongly against finding interlocutory disqualification orders appealable as of right.[29]

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[29] In this case, for example, the extensive delay resulting from appellate review of the district court's disqualification order could well undermine the government's case against petitioners. The victims' ability to recall with any specificity the events surrounding their arrests is likely to be hampered by the delay, and the defense's cross examination of their testimony will surely capitalize on the lapse of time. The victims, moreover, generally occupy the lower socio-economic strata of our society and are prone to frequent moves, with concomitant difficulties in keeping in touch with and responding to communications from the government. The prosecution, in fact, was completely unable to locate one of the victims for a substantial period of time. Another victim, Arthur Adams, is 60 years of age and of infirm health. The tactical advantages that such difficulties bestow on the defense are not likely to escape less than scrupulous defense counsel—especially in narcotics and organized crime prosecutions, where joint representation of multiple defendants is distressingly common. See, *e.g.*, *United States* v. *Elrod*, No. 82-2063 (7th Cir. Aug. 19, 1983)

In addition to the fact that review of a disqualification order halts the criminal trial, the disqualification question itself often cannot be successfully separated from the merits of the criminal prosecution. Contrary to the interlocutory claim at issue in *Cohen*, 337 U.S. at 546-547, "which [was] not an ingredient of the cause of action and [did] not require consideration with it," the disqualification order contested by petitioners rests upon the district court's construction of the charging papers filed against petitioners as well as "the numerous pretrial motions, together with supporting memoranda of law, filed by defense counsel" (Pet. App. A16). Any meaningful review of the district court's determination, therefore, is inextricably bound up with the conduct of the criminal trial. Indeed, the court of appeals, in reviewing the district court's order, was required to analyze the indictment, parse petitioners' own pleadings, compare and contrast petitioners' varying roles in the charged conspiracy, predict the future course of conduct by counsel for petitioners and the government, and consider specific evidentiary questions that might arise at trial (Pet. App. A6-A7). The disqualification question presented here, in short, is simply not "collateral" in any real sense to the merits of the criminal case, and the Court cannot find this interlocutory order immediately appealable without substantially expanding the doctrinal foundations of a rule originally crafted to apply only to a "small class" of cases. *Cohen*, 337 U.S. at 546.

(petitioner waives right to separate counsel in state narcotics prosecution but nevertheless raises Sixth Amendment claim in habeas corpus action); *United States* v. *Mers*, 701 F.2d 1321 (11th Cir. 1983) (multiple narcotics defendants engage single attorney and then claim ineffective assistance of counsel on appeal); *United States* v. *Alvarez*, 696 F.2d 1307 (11th Cir. 1983) (same).

Such doctrinal expansion would be particularly unwise in the circumstances of this case. Admittedly, it is "wholly desirable to correct prior to trial any substantive errors noticed at that time." *Hollywood Motor Car Co.*, slip op. 5, But a litigant's generalized interest in reversing unfavorable trial court rulings has never been considered sufficient to warrant interlocutory appeal of otherwise nonfinal orders. Indeed, there are a whole host of interlocutory trial court rulings on various constitutional, procedural and substantive issues that may be adverse to the accused (*i.e.*, refusals to exclude evidence on Fourth Amendment grounds, denials of motions for severance or continuance, and admission into evidence of alleged hearsay evidence) that regularly and routinely await conviction and imposition of sentence prior to appellate review. Although there is obvious value " 'in triumphing before trial, rather than after it,' " the Court has consistently held that "reversal of the conviction and, where the Double Jeopardy Clause does not dictate otherwise, the provision of a new trial free of prejudicial error normally are adequate means of vindicating the constitutional rights of the accused." *Id.* at 5-6 (footnote omitted), quoting *MacDonald*, 435 U.S. at 860.[30]

[30] The case for appealability of an order disqualifying defense counsel is even weaker than that found insufficient in *MacDonald* and *Hollywood Motor Car Co.* In each of those cases, the remedy sought was complete dismissal of the charges. Thus, if pretrial appeals had been allowed and decisions favorable to the defendants had been rendered, the possible result of interlocutory appeal in those cases would have been expeditious resolution of a criminal prosecution. Here, however, the only certain effect of interlocutory appeal is delay. (The disqualification order in this case was entered on December 2, 1981.) Allowance of an immediate appeal in the context of this case merely undermines the " 'societal interest in providing a speedy trial which exists separate from, and at times

There is, furthermore, nothing in the nature of the constitutional right asserted by petitioners that warrants exceptional treatment. Although interlocutory appeal may be appropriate in some circumstances to protect significant constitutional prerogatives against encroachment, the right claimed by petitioners plainly cannot claim such preeminence. The district court's order in this case does not deny petitioners the effective assistance of counsel—only the assistance of Sprague & Rubenstone. Indeed, the "right" that petitioners are asserting here is simply the right to insist upon representation by a firm willing to undertake employment under circumstances in which the vast majority of attorneys would withdraw. See Model Code of Professional Responsibility DR 5-105(C) (1980); Model Rules of Professional Conduct Rule 1.7 (52 U.S.L.W. at 7); Standards Relating to the Defense Function § 3.5(b) (1980). Whatever the "importance" of such a right, it is hardly more important than a myriad of other constitutional rights implicated during the course of a criminal prosecution. Cf. *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 12 (footnote omitted) (the Sixth Amendment does not guarantee "a 'meaningful relationship' between an accused and his counsel"). Should this Court conclude that the relative value of the right allegedly infringed by the disqualification order in this case is great enough to warrant interlocutory review, "numerous other questions would fall under such [an analysis], and the policy against piecemeal appeal in criminal cases would be swallowed by ever-multiplying exceptions." *Hollywood Motor Car Co.*, slip op. 7.[31]

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in opposition to, the interests of the accused.' " *MacDonald*, 435 U.S. at 862, quoting *Barker* v. *Wingo*, 407 U.S. at 519.

[31] If this Court holds that an order disqualifying defense counsel is immediately appealable because of its impact on the

Finally, application of the final judgment rule to disqualification orders will not foreclose immediate review of such orders in truly unusual cases. In

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relationship between the defendant and his counsel of choice, the Court can anticipate a proliferation of claims by defendants that various other orders are likewise immediately appealable. To take the most obvious example, criminal defendants can be expected to assert that the denial of a continuance infringes upon the same right. See generally note 39, *infra*. If the district court's denial of a continuance is appealable, or even colorably so, the court will lose a substantial portion of its discretion in granting and denying such orders. See *Ungar* v. *Sarafite*, 376 U.S. 589 (1964). A defendant will be able to obtain a continuance simply by appealing its denial.

Moreover, although the disqualification order in the present case resulted from the joint representation of co-defendants with potentially conflicting interests, it is important to keep in mind that other grounds for disqualification also often arise. For example, counsel may be laboring under a conflict of interest between the defendant and a former client who will testify at trial as a prosecution witness. See, *e.g.*, *United States* v. *Agosto*, 675 F.2d 965, 971 (8th Cir.), cert. denied after remand and subsequent affirmance *sub nom. Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982), in which a major organized crime prosecution was delayed for nearly one year while such a disqualification order was appealed and reappealed. See also *United States* v. *Provenzano*, 620 F.2d 985, 1005 (3d Cir. 1980), cert. denied, 449 U.S. 899 (1981) (discussing dangers of successive representation). In addition, there have been cases in which defense counsel is himself a target of an ongoing investigation of his clients (see, *e.g.*, *Cintolo* v. *United States*, cert. denied, No. 82-1383 (May 31, 1983)), or is otherwise involved in the criminal activities with which his client is charged (*e.g.*, *United States* v. *Hobson*, 672 F.2d 825, 828 (11th Cir. 1982)). Because, as is all too often the case, defendants can secure the cooperation of lawyers who are willing to blink the ethical principles that exist to regulate the practice of law, recognition of a right of interlocutory appeal for the broad spectrum of situations in which disqualification may be appropriate will encourage defendants to create conflict-of-interest situations in order to delay their trials.

Firestone Tire, 449 U.S. at 378-379 n.13, the Court suggested that, "in the exceptional circumstances for which it was designed," a writ of mandamus would be appropriate to review a district court's denial of a disqualification motion. We assume that the writ will also be available, where appropriate, to review the interlocutory grant of a disqualification motion in a criminal case.

Although the standards for issuance of the writ are strict (*Will* v. *United States*, 389 U.S. 90 (1967)), mandamus has several obvious advantages over interlocutory appeal in circumstances like those of this case. Mandamus, first of all, permits a defendant to obtain immediate redress where a disqualification order is blatantly erroneous and the impending harm is great; the defendant need not await final judgment "in a case where the conduct of the Circuit or District Court was irregular, or was flagrantly improper." *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824).[32] In contrast to an appeal, moreover, a petition for a writ of mandamus can be disposed of with considerable expedition, thus furthering the important societal interest in the speedy resolution of criminal prosecutions.[33] Perhaps most

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[32] See also *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957) (mandamus proper in exceptional circumstances to insure proper judicial administration); *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111 (1964) (same).

[33] Because mandamus is a discretionary remedy, an appellate court can reject mandamus petitions without a hearing and upon submissions from the petitioner only. Fed. R. App. P. 21(a) and (b). Mandamus petitions are given priority on the appellate docket (Fed. R. App. P. 23(b)), and the petition itself provides the court with the information necessary to determine whether the writ should issue (Fed. R. App. P. 21(a)). By comparison, a notice of appeal does not give the appellate court any information necessary to decide the question before

importantly, however, mandamus does not automatically divest the district court of jurisdiction to proceed with the trial and accordingly does not engender the delay and disruption that would be created by this Court's recognition of a general right of interlocutory appeal for such orders. Mandamus, properly confined, makes no broad inroad upon traditional concepts of finality, and finality, as Justice Frankfurter noted in *Cobbledick* (309 U.S. at 326), is not a mere "technical concept," but rather "the means for achieving a healthy legal system." See J. Moore, B. Ward & J. Lucas, 9 *Moore's Federal Practice* ¶ 110.26, at 286 (2d ed. 1982) ("With respect to the demands of justice made by individual cases, it seems clear that discretionary review by mandamus is to be preferred to enlarging by judicial interpretation the categories of interlocutory orders that are appealable as of right").

Accordingly, because the district court's order disqualifying defense counsel was not immediately appealable, the judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss the appeal.

II. IF APPEALABLE, THE DISTRICT COURT'S DISQUALIFICATION ORDER SHOULD BE AFFIRMED

Petitioners claim the unrestricted right to be represented by a single law firm of their choosing. They begin with the premise that the Sixth Amendment guarantees them the right to counsel of choice, and contend that this right extends even to those situa-

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it (see Fed. R. App. P. 3(c)), and the appeal itself—even if expedited—can be disposed of only following completion of briefing by both parties. See, *e.g.*, Fed. R. App. P. 11(a), 12(a) and 31(a). Thus, even summary dismissal of an appeal may be expected to take longer than denial of mandamus.

tions where the district court finds that multiple representation is contrary to settled standards of ethical legal conduct. See, *e.g.*, Pet. Br. 33-34. Contrary to petitioners' assumption, however, the Constitution does not unconditionally guarantee a defendant the right to be represented by a particular lawyer, or place the decision by multiple defendants to be represented by the same lawyer above judicial scrutiny. Indeed, to the extent such rights exist, it is clear that they are not absolute, but rather are subject to various reasonable restrictions. One of the most basic of these restrictions is the unremarkable fact that, just as he cannot retain a disbarred attorney or a lay spokesman, a defendant cannot retain a particular attorney when such employment would be contrary to the settled ethical standards that govern the practice of attorneys before United States courts.

Several threshold observations are necessary to put petitioners' claim that they have a constitutional right to insist upon the services of Sprague & Rubenstone in context. First, it is no part of the government's assertion here that criminal defendants do not ordinarily enjoy the right (from wherever it may be derived) to retain counsel of their choice from among the universe of attorneys who are members in good standing of the bar of the court in which the defendant is to be tried. Rather, the sole question is whether that universe may be slightly constricted by eliminating those few attorneys or firms who cannot accept the representation without violating widely recognized ethical standards for the practice of law. Second, in contrast to other rights of criminal defendants assertable and enforcible directly against the government, such as the right to a speedy and public trial, the defendant's retention of a particular lawyer depends on that lawyer's willingness to undertake the

representation—something neither the court nor the prosecution can compel. Thus, the "right" to be represented by an attorney burdened with a conflict of interest is entirely dependent upon the ability to find an attorney who is willing to undertake such professionally questionable representation—something we believe most attorneys would be unwilling to do. It is against this background that the alleged infringement of petitioners' "right" to representation by counsel of their choice must be evaluated.

A. The Sixth Amendment Does Not Protect A Defendant's Decision To Engage A Particular Lawyer

Without analysis or elaboration, petitioners' assert (Br. 33) that the Sixth Amendment "right to counsel" has "two prongs"; *i.e.*, "the defendant's right to counsel of choice and the defendant's right to conflict-free counsel." See also Pet. Br. 27, 29. But, while the second "prong" of petitioners' asserted Sixth Amendment right is well-established (*Cuyler* v. *Sullivan*, 446 U.S. 335 (1980)), the first "prong" plainly does not share that distinction. Indeed, this Court has never suggested that the Assistance of Counsel Clause guarantees the right, absolute or otherwise, to engage the services of a particular lawyer. To the contrary, the Court's rejection in *Morris* v. *Slappy* (slip op. 12) of the contention that the Sixth Amendment protects a defendant's right to a "meaningful relationship" with his attorney is wholly inconsistent with petitioners' assertion of such a right. Cf. *Jones* v. *Barnes*, No. 81-1794 (July 5, 1983) slip op. 6 (counsel does not have constitutional duty to raise every nonfrivolous issue requested by defendant). To be sure, a number of courts of appeals have suggested, without significant analysis, that the Sixth Amendment provides some protection for a defend-

ant's choice of counsel.[34] But those courts have also recognized that any right to counsel of choice is necessarily limited,[35] and the decisions themselves rest upon an overly expansive interpretation of the Assistance of Counsel Clause.

The central purpose of the Sixth Amendment right of an accused to the assistance of counsel for his defense is "to assure fairness in the adversary criminal process." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Defense counsel serves to counterbalance the skilled prosecutor. *United States* v. *Ash*, 413 U.S. 300, 308-309 (1973); *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938). This Court's cases construing the Assistance of Counsel Clause say nothing about the right to select a particular attorney.[36]

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[34] See, *e.g.*, *United States* v. *Agosto*, 675 F.2d 965, 969 (8th Cir. 1981); *Linton* v. *Perini*, 656 F.2d 207, 209-211 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982); *United States* v. *Laura*, 607 F.2d 52, 56-57 (3d Cir. 1979); *United States* v. *Burton*, 584 F.2d 485, 490 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); *United States* v. *Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976) (en banc), cert. denied, 429 U.S. 1104 (1977); *United States* v. *Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976); *United States* v. *Armedo-Sarmiento*, 524 F.2d 591, 592 (2d Cir. 1975); *United States* v. *Inman*, 483 F.2d 738, 739-740 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974).

[35] See cases cited at pages 42-43, *infra*.

[36] *Faretta* v. *California*, 422 U.S. 806 (1975), cited by virtually all of the courts of appeals that have found constitutional protection for a defendant's choice of a particular lawyer, did not rely on the Assistance of Counsel Clause and has nothing to do with choice of counsel. In that case, the Court held that implicit in the structure of the Sixth Amendment is the right of a criminal defendant to forego counsel and to represent himself. 422 U.S. at 818-820 & n.15. The right thus recognized was expressly held not to be in any way a manifestation of the right granted by the Assistance of Counsel Clause, but rather is an "*independent* right of self-representation." *Id.* at 820

Thus, so long as a defendant receives the effective assistance of some attorney, the demands of the Sixth Amendment have been met. Nothing in the language

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n.15 (emphasis in original). See *United States* v. *Wilhelm*, 570 F.2d 461, 466 (3d Cir. 1978) ("*Faretta* recognized two independent Sixth Amendment rights of representation—the right of self-representation and the right to assistance of counsel"). See also *United States* v. *Kelley*, 539 F.2d 1199, 1202 (9th Cir.), cert. denied, 429 U.S. 963 (1976). *Faretta* therefore has minimal relevance in determining whether a right to counsel of choice is subsumed within the Assistance of Counsel Clause.

In addition to *Faretta*, many courts cite *Powell* v. *Alabama*, 287 U.S. 45 (1932), to support their conclusion that the Sixth Amendment protects a defendant's right to counsel of choice. But, like *Faretta*, the citation is inapposite. *Powell* had nothing to do with a court's rejection of a defendant's chosen counsel; rather, the state court system had completely denied the defendants the opportunity to obtain any counsel. This occurred, moreover, during a period when appointment of counsel for the indigent was far from common. Therefore, when the Court stated that the defendants should have been "afforded a fair opportunity to secure counsel of [their] choice" (287 U.S. at 53), the Court was not suggesting that the defendants had the right to engage the services of a *particular* lawyer. Rather, the Court was emphasizing that the defendants should have been given the opportunity to obtain the effective assistance of counsel by the only certain method then available—employment of private counsel.

More in point is *Andersen* v. *Treat*, 172 U.S. 24 (1898), in which a habeas corpus petitioner claimed that "he was denied the assistance of counsel for his defence,' that is, the assistance of counsel of his own selection." *Id.* at 29. The complaint was that he was not allowed to retain the lawyer hired by five other suspects because the district judge believed his defense to be " 'inconsistent with the defence of others charged.' " *Id.* at 30. This Court affirmed the denial of habeas corpus relief, citing the then-current restrictive standard for availability of habeas corpus. The decision nevertheless suggests the nonexistence of the constitutional right to counsel of choice claimed by the petitioner, stating that the "exceptions to this rule [that

of the Sixth Amendment suggests that the right to counsel is a matter of personality, or that every defendant is entitled to the skilled assistance of a lawyer he likes.[37] So long as a defendant receives effective assistance from some skilled counsel—whom, if the defendant is not indigent, he is free to select from the entire universe of eligible attorneys whose participation in the trial would not be improper—the purpose behind the Sixth Amendment has been fully satisfied. *United States* v. *Morrison*, 449 U.S. at 365.

B. Any Right To Engage The Services Of A Particular Lawyer Is A Qualified One, Subject To Reasonable Restrictions

Notwithstanding petitioners' invocation of the Sixth Amendment, the nature of a criminal defendant's desire to be represented by a particular attorney is not, in fact, materially different from the like desire of a party to a civil case. And, to the extent the Constitution protects that interest, it is presumably by means of the Due Process Clauses of the Fifth and Fourteenth Amendments. Should the Court be prepared to recognize that a defendant has some

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the judgment of a court with jurisdiction over the offense and the defendant is not subject to collateral attack] when some essential right has been denied need not be considered." *Id.* at 31.

[37] There is no evidence to suggest that the Framers of the Amendment intended to protect a defendant's decision to engage a particular lawyer. See *Faretta*, 422 U.S. at 831 n.42: " 'The available debates on the various proposals [for a right-to-counsel provision] throw no light on the significance or the interpretation which Congress attributed to the right to counsel.' W. Beaney, The Right to Counsel in American Courts 23 (1955)." About all that can be said is that the Framers intended to alter the rule, then current in England, that denied the assistance of counsel to defendants in all felony cases, except those in which treason was charged. See, *e.g.*, *Faretta*, 422 U.S. at 823-826; *Powell* v. *Alabama*, 287 U.S. at 60.

constitutional right to engage the services of a particular lawyer, therefore, the Due Process Clause of the Fifth Amendment appears to be the proper analytical basis for that right. But, whatever the foundation for petitioners' claimed right to counsel of choice, that right is plainly not absolute. As the Court wrote in *Powell* v. *Alabama*, 287 U.S. at 69 (emphasis added), a trial court would violate "due process in the constitutional sense" only if it "were *arbitrarily* to refuse to hear a party by counsel, employed by and appearing for him." [38]

Every court of appeals has explicitly held, or at least clearly recognized, that the accused has no absolute right to counsel of his choice. See, *e.g.*, *United States* v. *Poulack*, 556 F.2d 83, 86 (1st Cir.), cert. denied, 434 U.S. 986 (1977); *United States* v. *Ostrer*, 597 F.2d 337, 341 (2d Cir. 1979); *United States* v.

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[38] *Chandler* v. *Fretag*, 348 U.S. 3, 9 (1954) (footnote omitted), is not to the contrary, even though the Court there stated that the petitioner's "right to be heard through his own counsel was unqualified." In *Chandler*, the state trial court denied the petitioner's request for a continuance to obtain counsel when, immediately before trial on a housebreaking and larcency charge, petitioner was informed he was also to be tried as an habitual criminal. The State argued that, because petitioner was ineligible for appointment of counsel under *Betts* v. *Brady*, 316 U.S. 455 (1942), the court's failure to grant the continuance was not reversible error. This Court rejected that argument because petitioner sought the continuance to obtain retained rather than appointed counsel. 348 U.S. at 9. In this context, then, the Court used the term "unqualified" merely to contrast petitioner's "qualified" right to *appointed* counsel with his undoubted right to hire counsel on his own. The language does not suggest that a defendant has an absolute right to insist upon counsel of choice, without regard to reasonable rules regulating the practice of law and the administration of justice—a question that was in no way before the Court. See *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964).

Dolan, 570 F.2d 1177, 1183 (3d Cir. 1978); *United States* v. *Inman*, 483 F.2d 738, 739-740 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974); *United States* v. *Kitchin*, 592 F.2d 900, 903 (5th Cir.), cert. denied, 444 U.S. 843 (1979); *Linton* v. *Perini*, 656 F.2d 207, 209 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982); *United States* v. *Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976); *United States* v. *Agosto*, 675 F.2d 965, 970 n.4 (8th Cir.), cert. denied after remand and subsequent affirmance *sub nom. Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982); *United States* v. *Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978); *United States* v. *Peister*, 631 F.2d 658, 661 (10th Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *United States* v. *Hobson*, 672 F.2d 825, 827, 829 n.* (11th Cir.), cert. denied, No. 82-57 (Oct. 12, 1982); *United States* v. *Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979). Thus, unlike the basic right to the assistance of counsel, *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963), or the right of self-representation, *Faretta* v. *California*, *supra*, each of which must be respected in all criminal cases, any right to counsel of choice, constitutional or otherwise, is plainly subject to reasonable limitations.

First, and most obvious, a defendant's right to counsel of choice is limited by the willingness of a particular attorney to represent him. No court to our knowledge has ever held that it has the power to force a lawyer to represent a defendant simply because the defendant wants that particular lawyer. Thus, the right to counsel of choice, if any, is wholly unlike the right to counsel recognized in *Powell* and *Gideon*, which can and must be enforced directly by the courts.

The decisions of this Court and other federal courts have recognized as legitimate and permissible

a number of other restrictions on the asserted right to counsel of choice. For example, in view of the public need for the efficient administration of criminal justice, the trial court has the discretion to deny a continuance in order to control its own docket, even when denying the continuance will effectively interfere with a defendant's desire to be represented by a particular lawyer.[39] The courts have also consistently held that even though an indigent defendant is entitled to appointment of counsel, he is not entitled to appointment of the particular lawyer of his choosing.[40] And, most significantly for this case, district courts have been held to possess considerable power to disapprove the defendant's choice of representative. Thus, a defendant is not entitled to be represented by a layman,[41] even if the layman has legal training.[42]

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[39] See generally *Ungar* v. *Sarafite*, 376 U.S. at 589 ("The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel"). See also *United States* v. *Burton*, 584 F.2d at 489-492; *United States* v. *Poulack*, 556 F.2d at 86; *United States* v. *Inman*, 483 F.2d at 740; *United States ex rel. Carey* v. *Rundle*, 409 F.2d 1210, 1213-1216 (3d Cir. 1969).

[40] *Morris* v. *Slappy*, *supra*; *United States* v. *Davis*, 604 F.2d 474, 478-479 (7th Cir. 1979); *United States* v. *Smith*, 464 F.2d 194, 197 (10th Cir.), cert. denied, 409 U.S. 1066 (1972); *United States* v. *White*, 451 F.2d 1225, 1226 (6th Cir. 1971).

[41] *United States* v. *Bertolini*, 576 F.2d 1133 (5th Cir. 1978); *United States* v. *Buttorff*, 572 F.2d 619, 627 (8th Cir.), cert. denied, 437 U.S. 906 (1978); *United States* v. *Wilhelm*, 570 F.2d at 466; *United States* v. *Taylor*, 569 F.2d 448, 450-451 (7th Cir.), cert. denied, 435 U.S. 952 (1978); *United States* v. *Kelley*, 539 F.2d at 1203.

[42] *United States* v. *Grismore*, 546 F.2d 844, 847 (10th Cir. 1976) (disbarred lawyer); *United States* v. *Hinderman*, 528

Indeed, a court need not permit representation even by a licensed attorney if the attorney is not a member of the court's bar.[43]

Finally, even if the defendant's chosen counsel is otherwise qualified to practice before the court, many decisions have recognized that counsel may properly be dismissed if continued representation would violate the Code of Professional Responsibility or would tend to undermine public confidence in the integrity of the legal system.[44] Accordingly, counsel have been disqual-

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F.2d 100, 102-103 (8th Cir. 1976) (same). See generally *Ex parte Wall*, 107 U.S. 265, 288 (1882) (holding that criminal conviction is not a prerequisite for striking attorney from rolls of practicing attorneys, stating "the courts ought not to hesitate * * * to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws").

[redacted] See *Leis* v. *Flynt*, 439 U.S. 438 (1979) (holding that out-of-state attorneys, not admitted to practice law in Ohio, had no constitutional right of their own to appear pro hac vice on behalf of criminal defendant in Ohio state courts). See also *Bedrosian* v. *Mintz*, 518 F.2d 396, 400-401 (2d Cir. 1975) (state court's refusal to appoint out-of-state counsel for indigent defendants held constitutional). See generally 28 U.S.C. 1654 (permitting parties in federal courts to conduct their cases themselves or by such counsel "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein"); Rules 5 and 6 of the Supreme Court of the United States (regulating appearance of attorneys before this Court).

[44] See *United States* v. *Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring) ("A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop * * * professional misconduct"). See also *United States* v. *Agosto*, 675 F.2d at 969, 976-977 (noting district court's responsibility for supervising members of its bar, as guided by Model Code of Professional Responsibility, in order to maintain public confidence in the legal profession

ified where representation of several persons involved in the litigation has either created a conflict of interest or given rise to a strong likelihood that an actual

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and to ensure integrity of judicial proceedings; affirming order disqualifying counsel for secretary where his primary loyalty was to her employer and co-defendant); *United States* v. *Hobson*, 672 F.2d at 828-829 (affirming order disqualifying defense counsel in drug trafficking case where government represented that witnesses would testify at trial that defense counsel had advance personal knowledge of some of the trafficking charged in the indictment; court cited Canon 9's proscription against appearance of impropriety and held that likelihood of public suspicion of lawyer's wrongdoing outweighed defendant's interest in being represented by attorney in question); *United States* v. *Ostrer*, 597 F.2d at 340-341 (affirming order disqualifying defense counsel where counsel had previously, as government attorney, participated in investigation involving three prospective witnesses at Ostrer's trial; court cited potential for use of privileged information and relied upon Canon 4 of the Model Code of Professional Responsibility); *United States* v. *Kitchin*, 592 F.2d at 903-904 (violation of accepted standards of legal ethics supports disqualification order; affirming order disqualifying defense counsel where attorney had been involved in early stage of case on behalf of the United States, citing Canon 4); *United States* v. *Dolan*, 570 F.2d at 1184 (affirming order disqualifying defense counsel where counsel had a conflict of interest, citing Model Code of Professional Responsibility DR 5-105(C) (1980), and stating that the court need not tolerate inadequate representation of defendant, because such representation invites disrespect for the integrity of the court and leads to future litigation attacking the proceedings); *United States* v. *Dinitz*, 538 F.2d at 1219-1224 (affirming district court's banning of defense counsel from courtroom following repeated instances of misconduct, citing Standards for Criminal Justice respecting making of bad faith arguments to jury and intentional disruptions of criminal proceedings).

See generally Judd, *Conflicts of Interest—A Trial Judge's Notes*, 44 Fordham L. Rev. 1097 (1976).

conflict of interest will emerge in the course of the proceedings.[45]

C. A Criminal Defendant Has No Right To Insist On A Particular Attorney Where Such Representation Is Contrary To The Accepted Ethical Standards Of The Legal Profession

1. The roots of the legal profession's general abjuration of multiple representation may well be as deep as the Biblical warning that "[n]o man can serve two masters." Matt. 6:24. And the inherent risk that an attorney serving two clients will "hold to the one, and despise the other" (*ibid.*) is nowhere so great as in the defense of a criminal prosecution.

While there is no flat prohibition on multiple representation of defendants in criminal cases, and such representation does not per se violate the Sixth Amendment's guarantee of effective assistance of counsel (*Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980); *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978)), this Court has recognized for decades the inherent evils of multiple representation. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60 (1942). A succint description of those evils is contained in *United States* v. *Curcio*, 680 F.2d 881, 887 (2d Cir. 1982):

> Our uneasiness about sanctioning the joint representation of criminal defendants persists because the dangers of prejudicial conflict are

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[45] See *United States* v. *Phillips*, 699 F.2d at 802-803 (affirming district court's order disqualifying defense counsel in narcotics prosecution where attorney also represented, and was being paid by, defendant's alleged supplier; held that strong likelihood that conflict of interests would arise in the course of proceedings justified pretrial disqualification); *United States* v. *Agosto*, *supra* (discussed in note 44, *supra*); *United States* v. *Dolan*, *supra* (discussed in note 44, *supra*).

both ubiquitous and insidious. "[A] possible conflict inheres in almost every instance of multiple representation," *Cuyler* v. *Sullivan*, *supra*, * * * in part because the interests of the defendants may diverge at virtually every stage of the proceeding, * * *. Thus, the joint attorney may have to prefer the interests of one defendant over the other in deciding, for example, whether to accept or reject a plea bargaining offer to one defendant conditioned on that defendant's testifying against the other; whether or not to present a defense that helps one defendant more than the other; whether or not to cross-examine a witness whose testimony may help one defendant and hurt the other; whether to have one defendant testify while the other remains silent; whether to have neither defendant testify because one would be a poor or vulnerable witness; whether or not to emphasize in summation that certain evidence is admitted only against (or is less compelling against) one defendant rather than the other; whether or not to argue at sentencing that one defendant's role in the criminal enterprise was shown only to be subordinate to that of the other defendant. These dilemmas are insidious because it often is not clear that the conflict of interests, and not pure trial strategy, are the reasons for the tactics adopted—or foregone—at trial. As the Supreme Court observed in *Holloway* v. *Arkansas*, "[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing," 435 U.S. at 489-90, 98 S. Ct. at 1181; "in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process," *id.* at 490, 98 S. Ct. at 1181 (emphasis in original).

See generally, Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119, 125-135 (1978); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939, 941-950 (1978); Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J. Crim. L. & Criminology 226, 233-239 (1977); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244 (1981). See also *United States* v. *DeFillipo*, 590 F.2d 1228, 1238 & n.17 (2d Cir.), cert. denied, 442 U.S. 920 (1979); Rule 44(c) Advisory Committee Note, 77 F.R.D. 594-600 (1978) (quoting numerous authorities). Cf. *Wood* v. *Georgia*, 450 U.S. 261 (1981) (discussing potential conflict of interests between defendants and third person who engaged their attorney); Criminal Justice Act, 18 U.S.C. 3006A(b) ("[T]he court shall appoint separate counsel for defendants who have such conflicting interests that they cannot be properly represented by the same counsel").

As explained by the commentators, the problems posed by multiple representation are compounded by the fact that the lay defendant will often fail to appreciate the way in which a conflict can affect an attorney's performance of his duties. See Geer, 62 Minn. L. Rev. at 141, 154; Lowenthal, 64 Va. L. Rev. at 971; *Developments*, 94 Harv. L. Rev. at 1395. Nor can the judge be depended upon to advise the defendant of all of the possibilities, for the judge will usually lack sufficient familiarity with the facts, and may be prevented from gaining such familiarity by the Fifth Amendment and attorney-client privileges. Geer, 62 Minn. L. Rev. at 141-142; Lowenthal, 64 Va. L. Rev. at 970. Nor, one must reluc-

tantly conclude, can the private bar be counted on to adequately educate joint defendants or withdraw in all cases in which multiple representation involves serious conflicts. First, it may be in the interest of some defendants, but not others, that the joint representation be maintained; the lawyer saddled with these conflicting interests will often be in an exceedingly poor position to give each client adequate advice regarding the decision whether to waive the right to conflict-free representation. Second, the retained counsel's financial interest inhibits voluntary withdrawal, and indeed may further contribute to the difficulty of giving the client disinterested advice on whether to retain separate counsel.[46]

Given the current lack of effective safeguards to prevent debilitating conflicts of interests, some have called for the total abolition of multiple representation in criminal cases. Geer, 62 Minn. L. Rev. at 157-162; Lowenthal, 64 Va. L. Rev. at 988-989; *Developments*, 94 Harv. L. Rev. at 1395. Such an ap-

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[46] See Geer, 62 Minn. L. Rev. at 145, 152-153; Judd, 44 Fordham L. Rev. at 1099-1107; Lowenthal, 64 Va. L. Rev. at 950-972 (survey showing that while many public defenders never engage in multiple representation, the private bar is far more willing to represent co-defendants). See also *Cuyler* v. *Sullivan*, 446 U.S. at 346-347 n.11 (after citing above studies, Court notes that while public defender offices have "a strong policy against undertaking multiple representation in criminal cases," the "private bar may be less alert to the importance of avoiding multiple representation"). Cf. *Wood* v. *Georgia*, 450 U.S. at 265 n.5 (Court reaches conflict of interest question despite the fact that the issue was not raised in the certiorari petition, precisely because the attorney who "prepared the petition for certiorari was the lawyer on whom the conflict-of-interest charge focused"; Court finds that "[i]t is unlikely that he would concede that he had continued improperly to act as counsel").

proach "would go a long way toward eliminating conflicts of interest in the criminal area" (*Developments*, 94 Harv. L. Rev. 1395-1396), while leaving the defendant free to choose counsel from among the large number of eligible attorneys who have no conflict of interest. As noted earlier, "there are many limitations upon the ability of a defendant to choose counsel under current law," and a total prohibition of joint representation would "simply impose[] one more: if an attorney represents one defendant in a particular criminal matter, the other defendants would have to find legal representation elsewhere." Geer, 62 Minn. L. Rev. at 160.[47] In the absence of any such blanket prohibition, however, the legal profession and the courts have adopted certain intermediate steps designed to prevent ineffective assistance of counsel attributable to multiple representation.

Thus, the American Bar Association has promulgated a mandatory disciplinary rule forbidding multiple representation unless "it is obvious that [the lawyer] can adequately represent the interest of each [client] and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." Model Code of Professional Responsibility DR 5-105(C) (1980).[48]

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[47] If petitioners' broad assertions are correct, however, such a measure would be unconstitutional, no matter how reasonable it might be as a regulation of the practice of law and an aid to the fair and efficient administration of criminal justice.

[48] The newly promulgated Model Rules of Professional Conduct, adopted by the American Bar Association at the August 1983 Annual Meeting, provide that a lawyer "shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after

Similarly, Section 3.5(b) of the Standards Relating to the Defense Function (1980) provides:

> Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear that:
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> (i) no conflict is likely to develop;
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> (ii) the several defendants give an informed consent to such multiple representation; and
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> (iii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully compre-

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consultation." Rule 1.7, Model Rules of Professional Conduct, 52 U.S.L.W. 1, 7 (Aug. 16, 1983). The new rule does not retreat from DR 5-105(C), but rather makes clear that, contrary to petitioners' assertion (Pet. Br. 37), a trial court need not defer to an attorney's decision to undertake employment despite possible conflicts of interest. If, in the circumstances of a given case, it is unreasonable to assume that conflicts of interest will not arise, joint representation may not be undertaken, notwithstanding counsel's willingness. And, as the comment to the new rule emphasizes, "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant." 52 U.S.L.W. at 7.

> hend the difficulties that an attorney sometimes encounters in defending multiple clients.
>
> In some instances, accepting or continuing employment by more than one defendant in the same criminal case is unprofessional conduct.

In addition, Fed. R. Crim. P. 44(c) requires federal district courts to inquire into all instances of multiple representation of defendants and to "take such measures as may be appropriate," unless "it appears that there is good cause to believe no conflict of interest is likely to arise." Those measures include the "possibility * * * that the court will order that the defendants be separately represented in subsequent proceedings in the case." Rule 44(c) Advisory Committee Note, 77 F.R.D. at 601.[49]

2. The district court and the court of appeals were both clearly correct in finding that Sprague & Rubenstone's continued multiple representation of the four petitioners would violate the accepted ethical standards of the legal profession, as embodied in the Model Code of Professional Responsibility and the Standards for Criminal Justice.[50] In such circumstances, disqualification is an entirely appropriate judicial response, notwithstanding petitioners' avowed desire to retain the firm. Rule 44(c) Advisory Committee

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[49] The Advisory Committee Note states that, despite a defendant's desire to be represented by a particular attorney, a trial court need not tolerate conduct that fails to conform with the Model Code of Professional Responsibility. " 'Under such circumstances, the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation' " (77 F.R.D. at 603, quoting *United States* v. *Dolan*, *supra*).

[50] E.D. Pa. R. 7 provides: "The canons of ethics of the American Bar Association as now existing be and as hereafter modified shall become standards of conduct for attorneys of this Court."

Note, 77 F.R.D. at 600-603. Indeed, the only reason a counsel of choice issue even remains in this case is because of Sprague & Rubenstone's persistent refusal to withdraw from joint representation, even in the face of its own pretrial pleadings grounded upon the differing interests of its clients.

Despite counsel's assurance that its joint representation of petitioners raises no ethical concerns (Pet. Br. 37), it is neither "obvious that [Sprague & Rubenstone] can adequately represent the interest" of each petitioner (Model Code of Professional Responsibility DR 5-105(C) (1980)), nor "clear that no conflict is likely to develop" (Section 3.5(b), Standards Relating to the Defense Function (1980)). And counsel's asserted belief (Pet. Br. 37) that "the representation will not adversely affect" the interests of the petitioners is far from "reasonabl[e]." Rule 1.7, Model Rules of Professional Conduct, 52 U.S.L.W. at 7. Rather, as the district court stated, the "potential for conflict just jumps out in this case" (Pet. App. A40). All four petitioners are charged with making false arrests. Petitioner Flanagan, the street decoy, had virtually all of the initial interaction with the petitioners' alleged victims. He was the one who called to the other three petitioners for assistance from their places of hiding. Obviously, as to those three, one major potential line of defense is that they lacked any criminal intent, since even if Flanagan intended to arrest innocent citizens without probable cause, their actions may have been taken in good faith. Other conflicts are equally apparent.[51]

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[51] How, for example, will joint counsel be able to protect the interests of all petitioners if one takes the stand to exculpate himself but blames one or more of the others? How is joint counsel to protect the interests of all petitioners if a particularly damaging piece of evidence is admissible against only

These difficulties, moreover, are not mere potentialities: petitioners' own pretrial pleadings already seek to take advantage of what they assert is the "gross disparity" in the inculpatory evidence against Flanagan and the other three (J.A. A20). By moving to dismiss Count I of the indictment because of petitioners' varying involvements in the alleged conspiracy (Pet. App. A6), and by seeking a severance of petitioner Flanagan's trial because the other petitioners would "suffer severe prejudice" if tried with him (J.A. A18), counsel for petitioners has made it abundantly clear that conflicts of interest lurk in every stage of the proceedings. In the government's view, therefore, continued multiple representation is unethical, and a trial court has the authority to require that the petitioners be separately represented.[52] Far from being an arbitrary interference with petitioners' right to counsel of choice, the disqualification

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one of them? If the government introduces a fairly weak case against one petitioner, how can joint counsel emphasize that weakness without by implication admitting the strength of the case against the others? Conversely, how can joint counsel minimize that implication without damaging the interests of the petitioner against whom the evidence is weak?

[52] Indeed, although counsel for petitioners repeatedly asserts that an actual conflict of interests will never arise in this litigation (Pet. Br. 8-10, 47-49), the pleadings drafted by counsel suggest that an actual conflict has already arisen. Justice Marshall, writing separately in *Cuyler* v. *Sullivan*, 446 U.S. at 356 n.3, stated that an actual conflict of interest arises any time "the defendants' interests * * * diverge with respect to a material factual or legal issue or to a course of action." Petitioners' pretrial pleadings, which unsuccessfully requested dismissal of Count I because of their differing involvement in the alleged conspiracy (Pet. App. A6) and separate trials because of the "severe prejudice" (J.A. A18) arising from a joint trial, plainly demonstrate that their interests have already diverged with respect to material legal, factual and tactical questions.

order here was amply justified by the court's responsibility to supervise the ethical practices of the attorneys appearing before it, and was well within its discretion under Fed. R. Crim. P. 44(c) to take "appropriate" measures in the absence of "good cause to believe no conflict of interest is likely to arise." [53]

The district court also did not err in refusing to permit Sprague & Rubenstone to represent any one of the petitioners once it had decided not to allow the firm to represent all four of them jointly.[54] It is well settled that an attorney is conclusively presumed to have had access to confidential information from a client that he formerly represented. See, *e.g.*, *United States* v. *Provenzano*, 620 F.2d 985, 1005 (3d. Cir.), cert. denied, 449 U.S. 899 (1980); *Arkansas* v. *Dean Foods Products Co.*, 605 F.2d 380, 384-385 (8th Cir. 1979); *United States* v. *Kitchin*, 592 F.2d at 904;

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[53] Petitioners argue that Fed. R. Crim. P. 44(c) does not contemplate a disqualification order (Pet. Br. 33-38). Rule 44(c), however, plainly grants the district courts wide discretion in dealing with joint representation questions. As the Advisory Committee Note points out, the rule "does not specify what particular measures must be taken to protect a defendant's right to counsel," but rather leaves such questions "within the court's discretion" because "the measures which will best protect each defendant's right to counsel may well vary from case to case" (77 F.R.D. at 600-601). The Advisory Committee Note also states that the discretion permitted under Rule 44(c) extends to entry of a disqualification order—even if the defendant expresses a desire to retain a particular attorney—where such a course of action is required to protect the interests of the individual defendant and the interest of the court in policing the ethical conduct of the bar. 77 F.R.D. at 600-603.

[54] Counsel for petitioners at one point even conceded that "'logic mandates'" disqualification of the firm of Sprague & Rubenstone as to any petitioner "should separate counsel be ordered" (Pet. App. A16).

Westinghouse Electric Corp. v. *Gulf Oil Corp.*, 588 F.2d 221, 224 & n.3 (7th Cir. 1978); *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128, 134-135 (2d Cir. 1976); *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973); *T.C. & Theatre Corp.* v. *Warner Brothers Pictures*, 113 F. Supp. 265, 268-269 (S.D. N.Y. 1953) (Weinfeld, J.). The presumption is necessary to protect the basic confidential nature of attorney-client relationships, for any inquiry into whether confidential information has in fact been conveyed by a client to his former lawyer would itself destroy the confidentiality that Canon 4 of the Model Code of Professional Responsibility protects. See, *e.g.*, *Westinghouse Electric Corp.*, *supra*; *NCK Organization Ltd.*, *supra*; *Emle Industries, Inc.*, *supra*; *T.C. & Theatre Corp.*, *supra*.

Because Sprague & Rubenstone has formerly represented all four of the petitioners, the firm would be in a position to use confidential information to the detriment of three of the petitioners if permitted to continue in its representation of one of them. For example, if one petitioner formerly represented by Sprague & Rubenstone were to take the stand and testify adversely to the petitioner still represented by that firm, the firm would be in a position to use confidential information in cross-examining the witness. That would be unfair to the former client and would violate Canon 4 of the Model Code of Professional Responsibility (1980).[55] Accordingly, the district

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[55] Disqualification of the entire firm, however, does not deny the individual petitioners the benefit of any possible background expertise Sprague & Rubenstone may have acquired during its joint representation. See Pet. Br. 6. The firm has an ethical obligation to cooperate fully with petitioners' separate counsel, and is duty bound to provide such counsel with all nonconfidential papers and factual data relevant to each peti-

court's order disqualifying Sprague & Rubenstone from representing all four petitioners was neither arbitrary nor an abuse of discretion under Fed. R. Crim. P. 44(c).[56]

3. Petitioners claim (Br. 9) that, notwithstanding their divergent personal interests, they have a right to choose to forgo separate paths and present a common defense. We do not disagree. But the decision below does not abridge petitioners' right to present a common defense.[57] Rather, in requiring them to obtain separate counsel, it simply assures that any deci-

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tioner's defense. See Model Code of Professional Responsibility EC 2-32 (1980).

[56] Petitioners assert (Pet. Br. i) that the court of appeals utilized an unduly deferential standard of review in affirming the district court's order in this case. That argument is unpersuasive. Because of the broad discretion granted the district courts under Rule 44(c), as well as their superior vantage point for assessing the potential for conflicts of interest in particular cases, an exacting standard of review would be inappropriate. This is especially so if, as we argue, the right at issue is simply to be free from arbitrary or unreasonable disqualifications. In any event, the court of appeals did not, in fact, test the district court's disqualification order under an "abuse of discretion" standard; the court specifically stated that it would reverse the district court if it found "that there is good cause to believe that no conflict of interest is likely to arise" (Pet. App. A5-A6). The only facet of the district court's order that was tested under an abuse of discretion standard was the trial court's decision to prevent Sprague & Rubenstone from representing any of the petitioners (*id.* at A11).

[57] See *Ford* v. *United States*, 379 F.2d 123, 126 (D.C. Cir. 1967) (separate counsel must initially be appointed for indigent co-defendants in every case; if, after fully investigating the case, counsel conclude that both the interests of justice and the interests of the clients will be served by joint representation, it may be allowed).

sion to present a common defense is at least reached in light of advice from conflict-free counsel.[58]

Petitioners further assert (Br. 23-33) that since their right to assistance of counsel may be waived entirely, they may effectively waive their right to conflict-free counsel.[59] That argument, however, misconceives the nature of the issue before the Court.

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[58] The necessity for separate counsel prior to the presentation of a common defense is especially great in cases, such as this one, where the defendants' legal fees are being paid by a third party. As the Court has already recognized, the fee-paying third party may have objectives that diverge substantially from the interests of the defendants, creating unacceptable risks for the defendants themselves. *Wood* v. *Georgia*, *supra*. Indeed, the Fraternal Order of Police, which is defraying petitioners' legal fees in this litigation, has reportedly adopted the policy, in other unrelated criminal litigation, of withdrawing legal assistance from any officer who "agrees to testify against other officers in hopes of receiving a reduced sentence." Philadelphia Daily News, Mar. 23, 1983, at 15, col. 1.

[59] The courts of appeals are divided on the question whether defendants are absolutely entitled to be represented by a single attorney if they waive their right to conflict-free separate counsel. The Second, Fifth and Sixth Circuits hold that defendants have the power to designate a single lawyer to represent them by virtue of such a waiver. See *United States* v. *Curcio*, 680 F.2d 881, 885-888 (2d Cir. 1982); *United States* v. *Armedo-Sarmiento*, 524 F.2d 591, 592 (2d Cir. 1975), *United States* v. *Garcia*, 517 F.2d 272, 275-278 (5th Cir. 1975); *United States* v. *Reese*, 699 F.2d 803, 805 (6th Cir 1983). The Third and Eleventh Circuits have held that defendants do not have the absolute right to waive their right to conflict-free counsel. *United States* v. *Dolan*, 570 F.2d at 1184; *United States* v. *Hobson*, 672 F.2d at 829.

The question is not whether petitioners can waive the right to conflict-free counsel, but rather whether they can insist on conflict-ridden counsel. The waiver of petitioners' right to conflict-free counsel has very little relevance to this inquiry.[20] In fact, in *Singer* v. *United States*, 380 U.S. 24, 34-35 (1965), the Court concluded that a defendant's ability to waive a broad range of Sixth Amendment rights did not bestow upon him the converse of those rights,[21] and there is no reason to accord petitioners' asserted right to counsel of choice, which they base on the Sixth Amendment, any differing treatment.

The fact, therefore, that petitioners may have waived their rights to independent counsel not burdened with conflicts of interest does not end the matter. Although petitioners can waive their rights to separate counsel, the Constitution does not entitle

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[20] In *Faretta*, for example, the Court was careful to point out that the right of self-representation did not exist because it was possible to waive the right to the assistance of counsel, but rather because that right had an independent constitutional basis. 422 U.S. at 819-820 & n.15.

[21] Singer argued that, because he had the ability to waive his Sixth Amendment right to a jury trial, he therefore could insist on a trial without a jury. Although the Court recognized that a defendant can waive his right to trial by jury, it concluded that a defendant's waiver did not require the court and the government to accept his choice of a bench trial. The *Singer* Court also pointed out that an accused has no absolute right to compel a private trial, even though he has a right to a public trial (see *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980)), nor can an accused compel transfer of his trial to a district in which the crime was not committed, even though he has a right to trial where the crime was committed. 380 U.S. at 35. Finally, an accused cannot compel the government to try his case by stipulation, even though he has a right to confront the witnesses against him. *Ibid.*

them to insist on joint legal representation that does not meet established standards of ethical professional conduct. As detailed at some length above (pages 41-47, *supra*), petitioners' claimed right to counsel of choice cannot be absolute, and petitioners' waiver argument masks but does not alter that undeniable fact. By "waiving" their rights to separate counsel, petitioners cannot annul the strong and independent public interest in the fairness of criminal trials and the integrity of the legal profession. "The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice." *Middlesex Ethics Committee* v. *Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982).

Petitioner's waiver argument, moreover, is fraught with difficulties for the fair and efficient administration of the criminal justice system. It is inherently difficult to determine whether a lay defendant has intelligently and knowingly waived any objections to conflicts of interest that may arise in the later course of criminal proceedings. See, *e.g.*, *United States* v. *Elrod*, No. 82-2063 (7th Cir. Aug. 19, 1983), slip op. 10. Because of the trial court's limited knowledge of the facts of a particular case before trial, as well as the court's inability to delve into attorney-client confidences, the district court is not in a position to educate fully the defendant regarding the possible conflicts that could arise from a particular joint representation. Geer, 62 Minn. L. Rev. at 141-142. Nor can conflict-ridden counsel be relied upon to obtain an informed waiver. *Id.* at 145; Rule 44(c) Advisory Committee Note, 77 F.R.D. at 596. In any event, it is quite likely that a lay defendant will fail to appreciate how the broad array of potential conflicts growing out of joint representation will injure his defense.

Of necessity, he is to some extent buying a pig in a poke.

Accordingly, as the reported cases demonstrate, a finding of intelligent and knowing waiver of the right to conflict-free counsel is almost tailor-made for post-conviction attack. See, *e.g.*, *United States* v. *Elrod*, *supra*; *United States* v. *Vowteras*, 500 F.2d 1210, 1211 (2d Cir.), cert. denied, 419 U.S. 1069 (1974); Rule 44(c) Advisory Committee Note, 77 F.R.D. at 594. See also cases cited at notes 34, 44, 59, *supra*. Permitting district courts to disqualify defense counsel in the circumstances of this case, therefore, not only enforces the ethical standards of the legal profession, but furthers society's interests in the speedy and final determination of criminal cases as well. For by disqualifying counsel when there is a substantial potential for a conflict of interest, there will be no need for subsequent litigation focusing on the validity of the defendant's waiver of his right to conflict-free counsel and related due process claims. See *United States* v. *Dolan*, 570 F.2d at 1184; *United States* v. *Mari*, 526 F.2d 117, 119-121 (2d Cir. 1975) (Oakes, J., concurring). See generally Rule 44(c) Advisory Committee Note, 77 F.R.D. at 596-597.[42]

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[42] We are disturbed by the implication in some cases that defendants retain the ability to attack their convictions on the ground that their counsel labored under conflicting interests even where they had *validly* waived their right to conflict-free counsel. See, *e.g.*, *United States* v. *Elrod*, slip op. 10 (although court finds that habeas corpus petitioner knowingly waived his right to separate counsel, it refuses to foreclose possibility that petitioner's attorney "acted incompetently in deciding to represent the petitioner and his co-defendants" despite the waiver); *United States* v. *Vowteras*, 500 F.2d at 1211, (the defendants having been "fully advised of the facts underlying

The criminal process is not merely a contest between the government and the accused. The criminal justice system also serves as "an outlet for community concern, hostility, and emotion." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 571 (1980) (opinion of Burger, C.J.). That outlet for community concern and emotion, furthermore, is more than simply a channel for vengeance. Rather, to a people proud of its traditional freedoms, the criminal process is also a daily demonstration of the fairness of our law. It is for that important reason that our criminal process must "satisfy the appearance of justice." *Offutt* v. *Unied States*, 348 U.S. 11, 14 (1954). See *Richmond Newspapers, Inc.*, 448 U.S. at 571-572 (opinion of Burger, C.J.); *id.* at 593-594 (opinion of Brennan, J.); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 427-429 (1979) (Blackmun, J., dissenting).

Accordingly, it is not up to the defendant in a criminal trial to vitiate the fairness of that proceeding by deciding for himself to employ counsel ren-

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the potential conflict * * * cannot now repudiate their choice [of joint representation] in the absence of a credible showing of 'some specific instance of prejudice, some real conflict of interest, resulting from a joint representation * * *' "). See also *Cuyler* v. *Sullivan*, 446 U.S. at 353 (opinion of Brennan, J.); *id.* at 354 n.1 (opinion of Marshall, J.). In the government's view, it should be firmly established that, if a defendant has effectively waived his right to conflict-free counsel under the standards of *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), he is forever barred from raising ineffective assistance of counsel claims based on the conflicting interests of counsel. See, *e.g.*, Pet. App. A9 ("A truly knowing and intelligent waiver accepted by the court will insulate a conviction from later attacks"). But, to the extent that a valid waiver is not to be construed as genuinely final, there is all the more reason to recognize the power of the district court to require separate counsel in cases in which there is a demonstrable likelihood that the representation will be infected by a conflict of interest.

dered ineffective by conflicts of interest, for an unjust conviction not only injures the defendant but is inimical to the community's trust in the integrity of its courts.[63] The stated goal of the criminal process is to "provide for the just determination of every criminal proceeding" (Fed. R. Crim. P. 2), and the fulfillment of that goal requires more than simply according substantial deference to a defendant's expressed desire to retain a particular attorney. It requires as well that the public's "interest in having criminal prosecutions decided on truthful and complete records" be given full recognition, even though that interest "does not necessarily coincide with that of the accused." *Gannett Co.* v. *DePasquale*, 443 U.S. at 428 (Blackmun, J., dissenting).[64] In short, that a defendant has the right to a fair trial does not mean he has the right to insist upon an unfair trial.[65]

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[63] See Geer, 62 Minn. L. Rev. at 155-157; Comment, 68 J. Crim. L. & Criminology at 251; *Developments*, 94 Harv. L. Rev. at 1394.

[64] Cf. Fed. R. Crim. P. 11(f), which requires that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Thus, it is not up to the defendant to determine that he shall be convicted in circumstances falling below certain minimum standards insisted upon by society.

[65] A defendant's willingness to accept an unfair trial is not as farfetched as it sounds. A less culpable defendant may be willing to forego efforts to protect his own rights in order to help a more culpable co-defendant, who may be a friend or family member. Geer, 62 Minn. L. Rev. at 145. Worse, he may do so to forestall retaliation from a more powerful co-defendant.

CONCLUSION

The judgment of the court of appeals should be vacated for lack of jurisdiction, with instructions to dismiss the appeal. In the alternative, the judgment should be affirmed.

Respectfully submitted.

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No. 82-374

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT FLANAGAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

JAMES KEWESHAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

JOSEPH LANDIS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

THOMAS McNAMEE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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TABLE OF CONTENTS

		Page
TABLE OF CITATIONS		iii
I.	A PRE-TRIAL ORDER DISQUALIFYING COUNSEL CHOSEN BY A DEFENDANT IN A CRIMINAL ACTION IS IMMEDIATELY APPEALABLE UNDER 28 U.S.C. §1291	1
	A. The Decisions Of This Court Support The Conclusion That Lower Court Orders Disqualifying Chosen Counsel In A Criminal Case Are Immediately Appealable.	3
	B. The Overwhelming Circuit Court Authority Holds That Pre-Trial Disqualifications Of Criminal Defendants' Chosen Counsel Are Immediately Appealable.	11
	C. Questioned In Its Own Circuit And Based On A Faulty Premise, *United States v. Greger* Does Not Establish The Absence Of Appellate Jurisdiction.	15
II.	THE DISTRICT COURT'S DISQUALIFICATION ORDER DEPRIVED PETITIONERS OF THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR COMMON DEFENSE IN A CRIMINAL CASE PRESENTED BY COUNSEL OF THEIR CHOICE.	21
III.	THE COURTS BELOW ERRED IN DISQUALIFYING THE FIRM OF SPRAGUE & RUBENSTONE BASED ON ITS ACQUISITION OF PRIVILEGED INFORMATION THROUGH THE ATTORNEY-CLIENT RELATIONSHIP.	30
	A. Were The Trial And Appellate Courts Correct, There Can Be No Common Defense .	32

TABLE OF CONTENTS

B. Were The Courts Below Correct, There Can Never Be Multiple Representation 33

C. Were The Courts Below Correct, Counsel Would Be Precluded From Communications With Substitute Counsel 34

IV. CONCLUSION 35

TABLE OF CITATIONS

Cases:	Page
Abney v. United States, 431 U.S. 651 (1977)	5, 7, 18
Ah Ju Steel Co., Ltd. v. Armco, Inc., 680 F.2d 751 (U.S.C.C.P.A. 1982)	14
Blackledge v. Perry, 417 U.S. 21 (1974)	11
Chandler v. Fretag, 348 U.S. 3 (1954)	24
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	3-7, 13, 15, 17
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	3
Cuyler v. Sullivan, 446 U.S. 335 (1980)	9
Davis v. Stamler, 650 F.2d 477 (3d Cir. 1981)	24
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981)	10-12, 13-15
Glasser v. United States, 315 U.S. 60 (1941)	24
Gough v. Perkowski, 694 F.2d 1140 (9th Cir. 1982)	19-20
Helstoski v. Meanor, 442 U.S. 500 (1979)	5-7, 18
Holloway v. Arkansas, 435 U.S. 475 (1978)	30
In Re Coordinated Pretrial Proceedings, etc., 658 F.2d 1355 (9th Cir. 1981), *cert. denied* 102 S.Ct. 1615 (1982)	18-20
Leis v. Flynt, 439 U.S. 438 (1979), *reh. denied*, 441 U.S. 956 (1979)	24
North Carolina v. Pearce, 295 U.S. 711 (1969)	11
Slappy v. Morris, 649 F.2d 718, *rev'd sub nom. Morris v. Slappy*, 103 S.Ct. 1610 (1983)	17
Stack v. Boyle, 342 U.S. 1 (1951)	3, 5, 7, 18

United States v. Agosto, 675 F.2d 965 (8th Cir. 1982), *cert. denied* after remand and subsequent affirmance *sub nom. Gustafson v. United States*, 103 S.Ct. 77 (1983) 14, 27

United States ex rel. Carey v. Rundle, 409 F.2d 1210 (3d Cir. 1969), *cert. denied* 397 U.S. 946 (1970) 24

United States v. Cicale, 691 F.2d 95 (2d Cir. 1982) 24

United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982) 12, 27

United States v. Curcio, 680 F.2d 881 (2d Cir. 1982) 24, 27

United States v. Curcio, 694 F.2d 14 (2d Cir. 1982) . 12, 13, 16, 17, 23-25

United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978) 13, 27-28

United States v. Duklewski, 567 F.2d 255 (4th Cir. 1977) 13

United States v. Fox, 613 F.2d 99 (5th Cir. 1980) . 27

United States v. Garcia, 517 F.2d 272 (5th Cir. 1975) 13, 27

United States v. Gouveia, 704 F.2d 1116 (9th Cir. 1983) *cert. denied* 103 S.Ct. 1891 (1983) ... 20

United States v. Greger, 657 F.2d 1109 (9th Cir. 1981) *cert. denied* 103 S.Ct. 1891 (1983) . 15-18, 19-20

United States v. Hobson, 672 F.2d 825 (11th Cir.) *cert. denied* 103 S.Ct. 208 (1982) .. 14, 24, 28-29

United States v. Hollywood Motor Car Co., Inc., 102 S.Ct. 3081 (1982) 10-12

TABLE OF CITATIONS

United States v. Laura, 607 F.2d 52 (3d Cir. 1979) 17, 23

United States v. MacDonald, 435 U.S. 851 (1978) 6-7, 8, 11

United States v. Morrison, 449 U.S. 361 (1981), *reh. denied*, 450 U.S. 960 (1981) .. 8-9, 12, 17, 20

United States v. Phillips, 699 F.2d 798 (6th Cir. 1983) 13-14

United States v. Reese, 699 F.2d 803 (6th Cir. 1983) 27

United States v. Smith, 653 F.2d 126 (4th Cir. 1981) 13

United States v. Unger, 665 F.2d 251 (8th Cir. 1981) 27

Statutes and Rules:

United States Constitution:
- Amendment I, Speech or Debate Clause 5
- Amendment V
  - Double Jeopardy Clause 4-6
  - Due Process Clause 24
- Amendment VI ..... *passim*
  - Assistance of Counsel Clause ..... *passim*
  - Speedy Trial Clause 6-7

28 U.S.C. §1291 ..... *passim*

Federal Rules of Criminal Procedure Rule 44(c) . 15, 21, 25

Miscellaneous:

Moore, J., *Federal Practice*, Vol. 9, ¶110.26 (1983) 6

No. 82-374

IN THE

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October Term, 1982

ROBERT FLANAGAN, et al.,

Petitioners

v.

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Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

I. A PRE-TRIAL ORDER DISQUALIFYING COUNSEL CHOSEN BY A DEFENDANT IN A CRIMINAL ACTION IS IMMEDIATELY APPEALABLE UNDER 28 U.S.C. §1291

A defendant's constitutional right to counsel of choice in a criminal action is irretrievably lost if appellate courts lack pre-trial jurisdiction to reverse a trial court's disqualification of a defendant's chosen attorney. Absent such pre-trial appellate review, a defendant would be compelled to stand trial with counsel other than counsel of his choice, a deprivation of extraordinary significance which cannot be cured by post-trial appellate review.

The compelling need for immediate appellate review of such disqualification decisions is clear given the irremediable constitutional deprivations of a criminal defendant's rights which would inevitably result in those

instances where that decision is erroneous.[1] If a defendant is forced to stand trial with substitute counsel, his Sixth Amendment right to counsel of his choice has been eradicated. If acquitted, a defendant has nonetheless been denied counsel of choice, which denial cannot be redressed. More significantly, if convicted after trial with substitute counsel, a defendant who successfully establishes on appeal that the trial court's disqualification order was erroneous, may nevertheless be without a remedy. Were second or third choice counsel marginally competent, no conviction would be overturned because the defendant could not demonstrate prejudice arising from the disqualification ruling. Indeed, unless this Court holds that any conviction returned after a wrongful disqualification of counsel of choice is presumptively prejudicial and necessarily requires a retrial, a defendant is without any remedy following the erroneous disqualification of his chosen attorney. And even were this Court to presume prejudice, the effects of representation at trial by substitute counsel may yet be irreparable. For example, on retrial, counsel would not be able to undo various consequences of representation by substitute counsel, such as the defendant's decision to testify, to produce or not to produce alibi witnesses, or to waive the right to inspect and analyze physical evidence, subsequently destroyed prior to retrial. Furthermore, the intangible harm which may result from substitute coun-

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1. Non-constitutional issues also require that such disqualification be immediately reviewable. For example, economic considerations may directly affect a defendant's ability to retain even second or third choice counsel. In addition, questions of time between a trial court disqualification of chosen counsel and trial on the merits may also preclude second or third choice counsel from providing proper representation to a defendant. Further, due to a long-standing relationship which may exist between client and counsel or counsel's involvement in and familiarity with the particular facts of the prosecution, counsel's unique ability to provide representation to the client must be accorded substantial weight.

sel's handling of a first trial, such as attitudes formed by the court, prosecution and/or defense witnesses towards the defendant and his case based solely upon the demeanor, strategy and performance of substitute counsel, may be irremediable.

A review of the decisions of this Court and of the rulings of those Circuit Courts that have considered the precise jurisdictional question at issue, and application of practical considerations to the question posed, make it clear that overwhelming authority exists establishing the jurisdiction of courts of appeals over pre-trial orders disqualifying counsel in a criminal action.

A. The Decisions Of This Court Support The Conclusion That Lower Court Orders Disqualifying Chosen Counsel In A Criminal Case Are Immediately Appealable

The jurisdiction of the Courts of Appeals is limited to "final decisions of the District Courts," pursuant to 28 U.S.C. §1291. This Court has read that statute to permit interlocutory appeals from orders falling within the "collateral order" exception first delineated in *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541, 545-547 (1949). To be immediately appealable under §1291 , such collateral orders "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

The *Cohen* rule has been applied by this Court in criminal cases. In *Stack v. Boyle*, 342 U.S. 1, 6 (1951), a lower court order denying a motion to reduce bail was, under the teaching of *Cohen*, held to be "appealable as a 'final decision' of the District Court under 28 U.S.C. §1291." Obviously, the denial of a motion to reduce bail conclusively determined the question and resolved an important issue completely separate from the merits of the action. Respecting the third prong of the *Cohen* test,

that the "collateral order" be effectively unreviewable on appeal from a final judgment, *Stack* is instructive. Had defendants gone to trial and been acquitted, no appellate review of the bail order would ever have occurred, even had that order been erroneous and despite the resultant unconstitutional deprivation. Had defendants gone to trial and been convicted, the propriety of the District Court's determination could have been reviewed on appeal. However, even if the appellate court found that the bail ruling was in error, no remedy would be available to defendants. Therefore, the term "effectively unreviewable," as formulated in *Cohen*, must necessarily mean that the reviewing court would be powerless to provide to the defendant full redress for the constitutional infringement suffered by him.

In *Abney v. United States*, 431 U.S. 651 (1977), this Court held that a District Court's pretrial order denying a motion to dismiss an indictment on double jeopardy grounds was a final decision, immediately appealable pursuant to 28 U.S.C. §1291 and *Cohen*. Applying the three-pronged test of *Cohen*, the Court, through Chief Justice Burger, found, despite the fact that the District Court's order could be reviewed on appeal if a conviction ensued, that the order would be "effectively unreviewable" at that time given the nature of the right at issue:

> "[T]his Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense. . . .
>
> "[T]he guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests totally

> unrelated to the propriety of any subsequent conviction. . . .
>
> "Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.* at 661-663.

As with *Stack*, *Abney* recognized that, were review of the double jeopardy question delayed until after conviction, the constitutional right asserted would be irretrievably lost and the defendant could not be made whole. Therefore, pre-trial appellate proceedings were required to assure effective appellate review.

In *Helstoski v. Meanor*, 442 U.S. 500 (1979), this Court held that 28 U.S.C. §1291 provided Courts of Appeals with jurisdiction to consider a District Court denial of a motion to dismiss an indictment based on a former congressman's assertion of immunity under the Speech or Debate Clause of the Constitution. In an opinion authored by Chief Justice Burger, this Court relied heavily upon *Abney* in holding:

> "[T]he Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves'. "Here, the holding of *Abney* becomes highly relevant; by analogy, if a Member 'is to avoid *exposure* to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs.' *Abney*, *supra*, 431 U.S. at 662." *Id.* at 508.

Helstoski, like *Stack* and *Abney*, held not only that the first two prongs of the *Cohen* test were met, but also that the District Court's denial of the motion to dismiss the indictment was "effectively unreviewable on appeal" be-

cause, even were there a conviction, the right asserted would be irretrievably eradicated were the congressman forced to stand trial.[2]

In *United States v. MacDonald*, 435 U.S. 851 (1978), this Court ruled that a trial court's order denying a motion to dismiss an indictment on speedy trial grounds was not appealable under 28 U.S.C. §1291. Writing for the Court, Justice Blackmun noted that the facts necessary to determine the motion would be best illuminated after trial, so that the first two prongs of the *Cohen* test had not been met. He also recognized that the third *Cohen* prong, whether the issue would be "effectively unreviewable on appeal from a final judgment," was not satisfied:

> "Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial. If the factors outlined in *Barker v. Wingo*, [407 U.S. 514 (1972)], combine to deprive

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2. In *Helstoski*, the Congressman attempted to challenge the District Court's denial of his motion to dismiss the indictment by seeking a writ of mandamus. The writ was denied by the Court of Appeals for the Third Circuit. In affirming the Third Circuit, this Court held that mandamus does not lie where another remedy exists, specifically, an appeal under 28 U.S.C. §1291.

The government's assertions, (U.S. Br., at 34-36), that mandamus lies to correct erroneous pretrial disqualification decisions in exceptional cases, is fallacious because mandamus jurisdiction on appeal generally goes only to the authority of the lower court to act and not to the correction of discretionary decisions of the lower court, except in the most extraordinary of circumstances. *See* 9 J. Moore, *Federal Practice*, ¶110.26 at 279-90 (1983). Particularly where the trial court's disqualification order is based on a finding of a potential conflict of interest, no appellate court can employ the writ of mandamus to correct even the most glaring abuse of discretion.

> an accused of his right to a speedy trial, that loss, by definition, occurs before trial. Proceeding with the trial does not cause or compound the deprivation already suffered." *Id.* at 862.

Since the existence of the constitutional deprivation claimed in *MacDonald* could not be determined until the full record had been made at trial, and, most significantly, since the deprivation already suffered — the right protected by the Speedy Trial Clause — would not be compounded by forcing the defendant to stand trial prior to appellate review, the holding in *MacDonald* is consistent with those of *Stack*, *Abney*, and *Helstoski*. Indeed, not only may the speedy trial issue be objectively and effectively reviewed after trial, but also, the right asserted in *MacDonald* could be fully vindicated in a post-trial appeal proceeding by reversal of the conviction.

Each of the cases discussed above teach that where the right protected would be lost if appeal is delayed until after trial, or where proceeding with the trial, prior to appeal, would cause or compound the deprivation of the right asserted, the trial court's order is immediately appealable pursuant to 28 U.S.C. §1291.

Given this analysis, it is clear that a trial court's pre-trial order disqualifying each Petitioners' chosen counsel and preventing such counsel from presenting a common defense in a criminal case is immediately appealable. Each of the three prongs of the collateral order doctrine established in *Cohen* is plainly met.[3] More-

3. The government's argument that a disqualification order does not satisfy the second aspect of the *Cohen* test because "any meaningful review of the District Court's determination is inextricably bound up with the conduct of the criminal trial" [U.S. Br., at 30-31] is pure sophistry. The propriety of the trial court's disqualification decision cannot be justified by recourse to the trial record. The record on appeal of a trial court's disqualification decision is limited to the record extant at the time the decision was rendered. Parenthetically, the fallacy of the government's contention that a *potential* conflict permits disqualification is apparent. A trial court's

over, proceeding to trial absent appellate review compounds the deprivation of a defendant's right to counsel by compelling him to stand trial with counsel other than counsel of his choice.

The very right which the Sixth Amendment affords to a defendant — the right to be represented at trial by counsel of his choice — is effectively and irrevocably denied once that defendant is forced to trial without counsel of his choice. If that right "is to be enjoyed at all," *MacDonald, supra,* 435 U.S. at 862, it must be vindicated prior to the inception of trial.

In this case, if Petitioners are forced to go to trial with substitute counsel, and are acquitted, the deprivation of their Sixth Amendment right to counsel of choice is nonetheless real, albeit remediless. More important, however, is the fact that if Petitioners are convicted after trial with substitute counsel, and even if Petitioners successfully establish, on appeal, that the trial court's order violated their Sixth Amendment right to counsel of choice, they will, nevertheless, still be without any effective remedy. In *United States v. Morrison,* 449 U.S. 361 (1981), *reh. denied,* 450 U.S. 960 (1981), this Court held that a violation of a defendant's Sixth Amendment right to counsel would not result in a dismissal of an indictment, absent a showing of prejudice. In *Morrison,* two federal agents, aware of the fact that the defendant had been indicted and had retained counsel, met and conversed with the defendant without the knowledge or permission of her counsel and disparaged her counsel to her. Defendant sought dismissal of the indictment based upon the agents' violations of her Sixth Amendment right to counsel. The District Court's denial of that motion was appealed to the Third Circuit which concluded

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NOTE — *(Continued)*
"prediction" that a potential conflict exists among the defendants can never be disproved, regardless of what occurs at trial, since that potential for conflict may always be present even though it never ripens into an actual conflict.

that, since the defendant's right had been violated "whether or not any tangible effect on respondent's representation had been demonstrated or alleged," *id.* at 363, the appropriate remedy was dismissal.

In reversing and remanding the Third Circuit's ruling in *Morrison*, this Court assumed that the defendant's Sixth Amendment rights had been violated but, nonetheless, concluded that dismissal was an inappropriate remedy given the absence of any showing of resultant prejudice to the defendant:

> "Here, respondent has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings. There is no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted. The Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings against respondent Morrison, much less the drastic relief granted by the Court of Appeals." *Id.* at 366-367.

The rationale of *Morrison* strongly suggests that were Petitioners in this case convicted after trial with substitute counsel and, on appeal, a court were to determine that the District Court erred in disqualifying chosen counsel from representing Petitioners herein, absent a specific showing of prejudice or adverse effect on substitute counsel's performance, the Petitioners would nevertheless not be entitled to a new trial with counsel of their choice. *See, Cuyler v. Sullivan*, 446 U.S. 335 (1980). Thus, if a review of the trial record were to disclose that substitute counsel was not ineffective, it is submitted that no retrial would be granted. For this additional reason, the constitutional right to counsel of choice must be addressed prior to the inception of trial if that right is to be vindicated. As is discussed, *infra*, since the issue in

this case is not one of effective assistance but of a defendant's right to counsel of his choice, the necessity for immediate appellate review is clear.

In the face of this analysis, Respondent relies on two cases, neither of which supports its position. In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), this Court held that orders *denying* motions to disqualify the opposing party's counsel in a civil case are not appealable final decisions under 28 U.S.C. §1291, that such orders are effectively reviewable on appeal after final judgment, and that:

> ". . . the order embodying such a decision will rarely, if ever, represent a final rejection of the claim of fundamental right that cannot effectively be reviewed following judgment on the merits." *Id.* at 377.

Here, to the contrary, disqualification of counsel is a final rejection of the claim of fundamental right. Perhaps in recognition of this fact, *Risjord*, in holding that the *denial* of the motion to disqualify counsel in a civil case was not appealable, expressly limited its holding to such a circumstance. *Id.* at 370 n.8. All *Risjord* holds is that in a civil case, where no Sixth Amendment right to counsel of choice adheres, a pre-trial order denying a motion to disqualify counsel is not immediately appealable.[4]

The other case on which the United States primarily relies is *United States v. Hollywood Motor Car Co., Inc.*, 102 S.Ct. 3081 (1982). In *Hollywood Motor Car*, this Court held that the denial of a motion to dismiss an indictment based on grounds of vindictive prosecution is

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4. As will be seen in Section B, *infra*, the Courts of Appeals which have considered whether *Risjord's* holding is applicable to orders *granting* motions to disqualify counsel in *criminal* cases have, with but one suspect exception, determined that *Risjord* does not and should not apply.

not immediately appealable as a final decision under 28 U.S.C. §1291. In so holding, the Court noted that the right to be free from vindictive prosecution "is simply not one that must be upheld prior to trial if it is to be enjoyed at all." *Id.* at 3085. In so concluding, this Court compared a vindictive prosecution claim to the speedy trial claim raised in *MacDonald*:

> "The nature of the speedy trial right was such that '[p]roceeding with a trial does not cause or compound the deprivation already suffered.' *Id.*, at 861." *United States v. Hollywood Motor Car, Inc., supra,* 102 S.Ct. at 3085.

Were the prosecution vindictive, such taint occurred at its inception. Standing trial absent appellate review neither creates nor expands the taint. The claim of vindictive prosecution can be objectively reviewed and quantified following a conviction and if the prosecution is found to be vindictive, the conviction would be automatically overturned. *North Carolina v. Pearce*, 295 U.S. 711 (1969); *Blackledge v. Perry*, 417 U.S. 21 (1974). Thus, the right asserted in *Hollywood Motor Car* is not irretrievably lost by requiring the defendant to stand trial, nor is the deprivation suffered by the defendant compounded if appellate review is delayed until after trial.

Thus, rather than supporting Respondent herein, both *Risjord* and *Hollywood Motor Car*, by their holdings and rationales, support the conclusion that the trial court's disqualification order in this case is an appealable order under 28 U.S.C. §1291.

B. The Overwhelming Circuit Court Authority Holds That Pre-Trial Disqualifications Of Criminal Defendants' Chosen Counsel Are Immediately Appealable

The Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits have either expressly or without

discussion determined that pre-trial appellate jurisdiction exists over trial court orders disqualifying criminal defendants' chosen counsel. These decisions, filed both prior and subsequent to the decisions of this Court in *Risjord* and *Hollywood Motor Car*, compellingly establish the propriety of such a determination.

In *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982), the Second Circuit pre-trial reversed a District Court order disqualifying counsel for defendants on grounds of conflict of interest, tersely noting that "orders disqualifying counsel are immediately appealable." *Id.* at 1066. In *United States v. Curcio*, 694 F.2d 14 (2d Cir. 1982), the same court again had the opportunity to consider whether a trial court's disqualification of a criminal defendant's chosen counsel was immediately appealable under 28 U.S.C. §1291. In reaffirming *Cunningham*, and in rejecting the very same arguments which are advanced by the government in the matter *sub judice*, Judge Friendly clearly articulated the reasons why the order disqualifying defendant's chosen counsel should be immediately appealable. Consistent with the *Morrison* analysis set forth above, *Curcio* rested its conclusion of appealability on the fact that review after final judgment would be wholly inadequate to protect a criminal defendant's right to counsel of choice because prejudice to that defendant would not be presumed merely from defendant's inability to proceed to trial with counsel of his choice:

> "[T]here are indications in our cases that prejudice might not be presumed from the erroneous disqualification of defense counsel. If so, [defendant] might well be required on appeal to show that he would not have been convicted had he not been deprived of his chosen counsel. *This burden would be well-nigh 'insurmountable,' and thus the order disqualifying [counsel] would be 'effectively unreviewable on appeal from a final judgment'.*"

United States v. Curcio, supra, 694 F.2d at 20. (Emphasis Added) (Citations omitted)

In *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978), the Third Circuit held that it had jurisdiction pursuant to 28 U.S.C. 1291 to hear a pre-trial appeal from a trial court's order disqualifying counsel chosen by a criminal defendant. Four and a half years later, in the case *sub judice*, decided subsequent to *Risjord*, the Third Circuit again held that it had such jurisdiction:

> "We have jurisdiction to hear appeals from District Court orders disqualifying counsel under 28 U.S.C. 1291 inasmuch as such matters are 'collateral orders' within the meaning of *Cohen v. Beneficial Industrial Loan Corp.*, 347 U.S. 541 (1949). . . . These holdings are not affected by *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 372 n.8 (1981)." PA 5.

In *United States v. Phillips*, 699 F.2d 798 (6th Cir. 1983), yet another post-*Risjord* decision, the Court of Appeals for the Sixth Circuit held that a trial court order granting the government's motion to disqualify a criminal defendant's chosen counsel was immediately appealable under §1291,[5] basing its holding on:

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5. In *United States v. Duklewski*, 567 F.2d 255 (4th Cir. 1977), the Fourth Circuit, without discussion, assumed jurisdiction over an appeal by a defendant from a denial of his motion to release to him and his counsel information provided to the District Court by the United States Attorney which formed the basis of the trial court's determination that counsel discontinue his representation of the defendant. In *United States v. Smith*, 653 F.2d 126 (4th Cir. 1981), the court also assumed pre-trial jurisdiction over an order disqualifying defendant's chosen counsel on conflict of interest grounds, and reversed the order. In *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975), the Fifth Circuit reversed a trial court order disqualifying chosen counsel from representing criminal defendants, held that such an order was appealable pretrial pursuant to the three prong test set forth in *Cohen*, and stated, "Deferral of review until after completion of the trial would dissipate judicial resources and possibly jeopardize the defendants' case by prohibiting representation at trial by counsel of their choice." *Id.* at 275.

> "*[t]he nature of the constitutional right involved and the pervasive effect of a disqualification order on the proceedings*. . . . To require a defendant in a criminal case to stand trial and risk conviction while deprived of the services of his chosen counsel without an opportunity to test the legality of the order of disqualification is fundamentally unfair. . . . *From the time of disqualification the defendant's case is affected by the loss of an attorney in whom he has confidence*. Even a most competent counsel who enters the picture following disqualification of the attorney first selected by the defendant labors under severe handicaps. A defendant erroneously deprived of the fundamental constitutional right to counsel of his choice should not be required to endure the rigors of trial and obloquy of conviction before establishing that error has been committed." *Id.* at 802. (Emphasis added.)

In *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982), *cert. denied* after remand and subsequent affirmance *sub nom. Gustafson v. United States*, 103 S.Ct. 77 (1983), the Eighth Circuit, despite the reversal of its decision in *Risjord*, nonetheless found a pre-trial order disqualifying a criminal defendant's chosen counsel to be immediately appealable. Finally, in *United States v. Hobson*, 672 F.2d 825 (11th Cir.), *cert. denied* 103 S.Ct. 208 (1982), the Eleventh Circuit held that a District Court order disqualifying counsel chosen by a defendant in a criminal case is a final order appealable under 28 U.S.C. §1291.[6]

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6. Similarly, in *Ah Ju Steel Co., Ltd. v. Armco, Inc.*, 680 F.2d 751 (USCCPA 1982), the Court of Customs and Patent Appeals held that it had jurisdiction, under 28 U.S.C. §1291, to consider pre-trial the propriety of an order disqualifying a party's chosen counsel in a civil case, relying in part on post-*Risjord* cases which have reaffirmed the appealability of such orders. *Id.* at 753 n.4.

Arrayed against this overwhelming weight of authority is but one case which is itself suspect for the flawed premise on which it rests and which has been questioned by the same Circuit from which it issued. To that case, we will now turn.

C. Questioned In Its Own Circuit And Based On A Faulty Premise, *United States v. Greger* Does Not Establish The Absence Of Appellate Jurisdiction

In *United States v. Greger*, 657 F.2d 1109 (9th Cir. 1981), *cert. denied* 103 S.Ct. 1891 (1983), the defendant appealed from a pre-trial order disqualifying counsel of his choice, which order was entered after a Rule 44(c) hearing at which Greger *refused* to waive his Sixth Amendment right to conflict-free representation and at which Greger's defense counsel stated that he would not ask potential witnesses against Greger, who were and had been current and former clients of defense counsel, to waive their attorney-client privileges. The Ninth Circuit dismissed the appeal for want of a final order under 28 U.S.C. §1291.[7]

Relying on *Risjord*, and focusing on the third prong of the *Cohen* test for an appealable "collateral order," a panel of the Ninth Circuit found that "Greger's 'plainly adequate' remedy is to obtain review of this order, and other claims of error should he so desire, at the conclusion of the trial, if he is convicted." *Id.* at 1112. This conclusion was based on the panel's understanding that, if Greger was convicted and if the disqualification of counsel was found to be erroneous on appeal, then prejudice

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7. This Court denied Greger's Petition for a Writ of Certiorari only after the Respondent had filed a "Supplemental Memorandum" setting forth that trial had concluded with Greger being represented by substitute counsel, which trial "would appear to have rendered moot the question . . . whether the Court of Appeals correctly dismissed Petitioner's pretrial appeal."

to Greger would be presumed and a new trial would be required:

> "On the other hand, if the defendant is found guilty and on appeal attacks the order disqualifying his counsel, there is no reason why his right to counsel of choice cannot be vindicated on appeal. *We would agree that if the defendant were required to show on appeal that he was convicted because of new counsel, the burden would be insurmountable and a disqualification 'effectively unreviewable on appeal.'* But such a burden need not be imposed. At least in this Circuit, if the order can be shown to have been erroneous, *prejudice will be presumed.*" *United States v. Greger, supra*, 657 F.2d at 1113. (Emphasis added.)

The *Greger* panel reemphasized this central thesis: that the presumption of prejudice would necessitate a new trial, thereby curing any disability which might possibly have resulted from the erroneous disqualification order:

> "In short, we do not deal here with a right such as the right against double jeopardy, which, if it is not vindicated before trial, is irretrievably lost. Greger can obtain review of the disqualification order after trial, and secure a new trial should he persuade the appellate court that the disqualification order is in error. A new trial protects Greger's right to counsel of choice, . . . " *Id.* at 1113.

Recognizing that the burden which would be imposed on a defendant, on appeal, to demonstrate prejudice as a result of an erroneous disqualification decision would be "insurmountable," the very same conclusion reached by Judge Friendly in *Curcio*, the *Greger* panel adopted a presumption of prejudice thereby mandating the grant of a new trial in an attempt to avoid the prescriptions of

the *Cohen* test.[8] But a new trial is, nevertheless wholly inadequate to cure the pervasive effect of an erroneous disqualification of chosen counsel. The decisions and conduct of substitute counsel both restrict and prejudice the ability of chosen counsel to represent his clients at any second trial. Therefore, the *Greger* court's conclusion that, even presuming prejudice, review of a pretrial disqualification order can be delayed until after trial is clearly incorrect.[9]

Given the very nature of the lawyer-client relationship and its critical significance in formulating and shaping the tactics and strategies adopted by a defendant prior to and during trial,[10] the deprivation of the right to counsel of choice cannot be cured even if the defendant is subsequently granted a retrial with counsel of

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8. The government itself is in clear disagreement with the rationale of *Greger*, is of record in opposing any presumption of prejudice where the disqualification order is found to have been entered in error, and argues that so long as substitute counsel is not ineffective, reversal would be inappropriate. (U.S. Br., at 27-28n.26). Yet the government ignores the impossible burden which would be imposed upon a defendant who is required to demonstrate such prejudice in this context, as is well recognized in *Morrison*, *Curcio*, and even in *Greger* itself. More pertinently, the approach advanced by the government cavalierly ignores the recognized, qualitative differences which exist among counsel and a defendant's vital interest in being afforded representation at trial by counsel of his choice and in whom he has placed his trust and confidence.

9. It appears that the *Greger* panel's assumption that prejudice is to be presumed from an erroneous disqualification order was based solely on the case of *Slappy v. Morris*, 649 F.2d 718, 723 n.4 (9th Cir. 1981). No Supreme Court authority was cited for that proposition. *Slappy* was reversed by this Court, *sub nom. Morris v. Slappy*, 103 S.Ct. 1610 (1983). Although this Court's reversal was predicated on the finding that no Sixth Amendment right was violated, so that the question of prejudice need not be considered, 103 S.Ct. at 1617 n.6, the *Greger* panel's failure to address *Morrison* casts substantial doubt on the validity of its assumption even within its own Circuit.

10. *See United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979).

his choice. For example, the irremediable consequences which surely result from a defendant's decision to testify at his first trial or his decision to present or to eschew the presentation of a common defense at his first trial, all on the advice of substitute counsel, cannot be corrected even if a retrial with counsel of his choice is granted. Numerous pretrial or trial issues may be raised, litigated, and lost, admissions might be made and evidence presented, technical defenses may be raised, such as entrapment or alibi, and certain admissions of fact may follow from such decisions. Testimony at the first trial would be admissible at the retrial, and substitute counsel's errors, shortcomings or tactical judgments in handling such testimony could have a severe impact upon the ultimate outcome of any second trial. Moreover, on the advice of second counsel, a defendant may decide to plead to the charges against him, a decision which prior counsel might have vehemently opposed, and, as a result, the propriety of the trial court's disqualification order may never be reviewed.

Indeed, it is apparent that, even presuming prejudice, the potential for injury which can result from being compelled to proceed to trial with substitute counsel is substantial, as has been recognized by each of the other Courts of Appeals that has addressed this issue, and that, as in *Stack*, *Abney* and *Helstoski*, the right to be represented by counsel of one's choice is a right which must be vindicated before trial if that right is to be meaningfully protected.

In *In Re Coordinated Pretrial Proceedings, etc.*, 658 F.2d 1355 (9th Cir. 1981), *cert. denied* 102 S.Ct. 1615 (1982), the Ninth Circuit first had the opportunity to consider its earlier decision in *Greger*. In *Coordinated Pretrial*, the Court of Appeals held that an order disqualifying defense counsel from representing present and former employees of defendants in connection with a civil action was immediately appealable under §1291.

In distinguishing *Greger*, the Ninth Circuit noted that, in the civil context, the right asserted would be irretrievably lost were the order unreviewable until after entry of a final judgment and further emphasized that the remedy of a new trial after appeal from a final judgment would not adequately redress any injury. Indeed, the Court specifically stated that ". . . in a civil case, the presumption of prejudice which would mandate a new trial if error were established under the criminal law does not exist." *Id.* at 1358.

Subsequently, in *Gough v. Perkowski*, 694 F.2d 1140 (9th Cir. 1982), the Ninth Circuit reaffirmed this same position, stating:

> "The burden a party would be required to meet in order to obtain a reversal could not practicably be met after final judgment in most civil cases. The fact that counsel was improperly disqualified would not, in itself, be sufficient to warrant a new trial since, as we said in [*Coordinated Pretrial*], there is no presumption of prejudice which attaches to such disqualification. *Id.* at 1143.

The *Gough* panel discussed *Greger* in the following manner:

> "We need not reconsider our *Greger* holding here, other than to note that if it conflicted with [*Coordinated Pretrial*] we would follow the latter ruling, not because the [*Coordinated Pretrial* decision] is later in time but because of our understanding of the principles underlying the *Cohen* rule. However, we believe the decisions can be reconciled and thus refrain from any reexamination of *Greger* at this time. *Id.* at 1143 n.3.

Thus, *Greger* stands alone. In direct conflict with it are the views of seven other Courts of Appeals. Indeed, the Ninth Circuit itself has seriously questioned the *Greger* opinion and the presumption upon which *Greger*

is based.[11] The rationale of *Greger* cannot, therefore, be supported. And since a retrial with counsel of choice cannot cure the ills arising from proceeding to trial with second-choice counsel, as is noted above, even the automatic grant of a new trial upon recognition that the disqualification decision was in error is insufficient to protect a criminal defendant's right to be represented by counsel of his choice.

Therefore, for all of the reasons set forth above, Petitioners respectfully submit that pre-trial orders disqualifying counsel of choice from presenting a common defense are collateral orders subject to interlocutory appellate review and that this Court should decide this case on the merits.

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11. The *Gough* view that the *Coordinated Pretrial* and *Greger* decisions could be reconciled was based upon *Gough's* acceptance of the erroneous view that a presumption of prejudice arises where a criminal defendant is compelled to go to trial with counsel other than that of his choice and that reversal of any conviction and the grant of a new trial is automatic where the disqualification decision is overturned. However, in *United States v. Gouveia*, 704 F.2d 1116 (9th Cir. 1983) (en banc), defendants challenged their convictions, raising Sixth Amendment claims based upon their being isolated in administrative detention for extended periods of time prior to being indicted, during which time they were denied access to counsel. Only six of the eleven members of the court *en banc* deemed such a denial to constitute a Sixth Amendment violation. Most significantly, of the six members of the court who found the constitutional violation, based on *Morrison, supra*, none presumed that prejudice was to be inferred, thereby requiring a reversal or remand. Indeed, based on *Morrison*, the majority entered into a lengthy analysis of the precise nature of the taint caused by the Sixth Amendment deprivation before determining that the pre-indictment isolation absent assistance of counsel was so prejudicial as to require the reversal of the judgments of conviction.

II. THE DISTRICT COURT'S DISQUALIFICATION ORDER DEPRIVED PETITIONERS OF THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR COMMON DEFENSE IN A CRIMINAL CASE PRESENTED BY COUNSEL OF THEIR CHOICE

In their opening Brief, Petitioners demonstrated that defendants jointly charged with the commission of criminal acts have a Sixth Amendment right to choose to present a common defense through retained counsel of their choice and that Rule 44(c) cannot be a vehicle for authorizing disqualification of counsel where criminal defendants jointly charged have intelligently and voluntarily made such a decision. Further, Petitioners contended that speculation as to the existence of potential conflicts of interest arising from multiple representation of persons jointly charged could not serve as the predicate for the disqualification of chosen counsel. Petitioners further contended that where defendants jointly charged are advised of potential conflicts arising from joint representation but, nonetheless, knowingly, voluntarily, and intelligently choose to proceed to trial with chosen counsel to present their common defense, the trial court cannot disqualify counsel but must accept the defendant's decision. Moreover, given the primary predicate upon which the lower courts rested their decisions, Petitioners argued that no basis for disqualification of counsel exists where the alleged, potential conflict of interest arises from the fact that, during the course of the attorney-client relationship, information is obtained by counsel representing multiple defendants jointly charged and wishing to present a common defense; and that a necessary precondition to the presentation of a common defense, be it by one or more attorneys, is the sharing of privileged information. Thus, were the District Court and Third Circuit rulings correct, it was contended that there could be neither a common defense presented by defendants jointly charged with the com-

mission of criminal acts nor multiple representation of defendants so jointly charged.

The government has refused to respond directly to the particular issues raised in Petitioners' initial brief. Instead, the government has studiously avoided these issues by raising numerous contentions which are irrelevant to the matter *sub judice* and by asserting, without factual basis, that the standards of ethical conduct to which members of the Bar are subject have been violated in this case, thus mandating disqualification.

First, the government argues that since a defendant cannot demand that he be represented by a disbarred attorney, a lay spokesman, a lawyer unwilling to represent him, a specific public defender, or an attorney whose other commitments make it impossible for him to adhere to a reasonable trial schedule imposed by a court [U.S. Br., at 37-38, 42-47], no defendant has an absolute Sixth Amendment right to counsel of choice. Petitioners have never contended otherwise and none of these factors are relevant to any determination of the issues raised herein. Furthermore, to say that the constitutional guarantee to counsel of choice is not absolute does not suggest that it may be denied at will or upon the mere speculation of a court or government counsel. In particular, in this case, where the government filed joint criminal charges against Petitioners and where they have retained specific, highly skilled counsel to present a common defense on their behalf, the constitutional guarantee of their right to counsel of choice precludes judicial intervention which undercuts that right.

The government argues that the Sixth Amendment is not violated so long as a defendant receives effective assistance of counsel. [U.S. Br., at 41]. This contention, too, begs the question, for the right to counsel of choice protected by the Sixth Amendment implicates factors and considerations which include but which also go far beyond questions of competence. Rather, the right to counsel here at issue is the Petitioners' right to have

their common defense presented by counsel of choice who are not only highly competent but in whom they have reposed their trust and confidence and with whom they are comfortable and secure at this critical stage in their lives. Put another way, the right at issue is Petitioners' right to choose to be represented by counsel whom, for innumerable practical and personal reasons, they each deem to be the best possible advocate for them in this case.

It cannot be overly emphasized, as many courts have noted, that the identity of specific counsel representing a defendant in a criminal case is of singular importance. Since attorneys may differ as to their skills, manner, style, and the strategies which they may adopt, despite all being within the range of effective advocates, a decision of a defendant to select a particular attorney is safeguarded by the Sixth Amendment:

> "We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of his defense. *Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the Sixth Amendment." United States v. Laura, supra,* 607 F.2d at 56. (Emphasis added)[12]

For the government to contend otherwise is to plainly distort reality. The right of a criminal defendant to retain and to be represented by counsel of his choice is funda-

12. *Accord: United States v. Curcio,* 694 F.2d 14, 22 (2d Cir. 1982) ("the right to be represented by counsel of one's choosing has long been regarded as part and parcel of the 'fundamental' right to be heard through counsel.").

mental in the Sixth Amendment. *See, e.g., United States v. Curcio*, 694 F.2d 14, 26 (2d Cir. 1982); cases cited in U.S. Br., at 39n. 34. As is noted in *Curcio*, "the right to counsel of choice has long been regarded as part and parcel of the 'fundamental' right to be heard through counsel. See *Powell v. Alabama*, 287 U.S. 45, 53 (1932)." *Id.* at 22.[13]

Thus, as set forth in their opening Brief, the right to counsel which each Petitioner enjoys has two facets, each based on the Constitution: the defendant's right to counsel of choice and the defendant's right to conflict-free counsel. Since each right belongs to each defendant, each defendant must necessarily have the power to choose which of those rights is to predominate where such rights might be in conflict. Although couched in terms of "waiver," a defendant's determina-

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13. Whether based on the Sixth Amendment right to counsel, or the Fifth Amendment right to due process, *see, e.g., Davis v. Stamler*, 650 F.2d 447 (3d Cir. 1981); *United States ex rel. Carey v. Rundle*, 409 F.2d 1210 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970), or a combination of rights embodied in both amendments, the right of a criminal defendant to the assistance of counsel of his choice is squarely bottomed on the Constitution. *See Glasser v. United States*, 315 U.S. 60, 70 (1941). That the right to counsel includes the right to retain counsel of choice is manifested by myriad decisions contained in Respondent's Brief, at n.34 and, *inter alia*, *United States v. Cicale*, 691 F.2d 95, 106 (2d Cir. 1982); *United States v. Curcio*, 680 F.2d 881, 888 (2d Cir. 1982); *United States v. Hobson*, 672 F.2d 825, 827-828 (11th Cir. 1982). There is no case holding to the contrary. In *Leis v. Flynt*, 439 U.S. 438 (1979), *reh.denied*, 441 U.S. 956 (1979), this Court held only that a lawyer does not have a Fourteenth Amendment property right to represent an individual where that lawyer has not been admitted to the Bar. Here, of course, the rights asserted are those of Petitioners, defendants in a criminal action who wish to secure their right to representation by retained counsel of their choice for the purpose of presenting their common defense. *See, Chandler v. Fretag*, 348 U.S. 3, 9 (1954) ("regardless of whether Petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified".)

tion to elevate his constitutional right to counsel of choice over his right to conflict-free counsel is merely an election by a defendant which must be respected by the courts. *See United States vs. Curcio, supra*, 694 F.2d at 22 and n.8; Petitioners' Initial Brief, at 23 *et seq.*

Most significantly, in this case, there is no conflict of interests. Therefore, there is no need for Petitioners to elect one constitutional right over the other or to waive their rights to effective assistance of counsel. Nonetheless, after an extensive Rule 44(c) inquiry, the District Court found that each Petitioner knowingly, voluntarily, and intelligently waived his right to representation by conflict-free counsel. Under such circumstances, each Petitioner's decision to implement his right to counsel of choice to present the common defense cannot be overriden.

The second smoke-screen seized on by the government to camouflage the absence of legal authority supporting its position is its trumpeting of vague statements to the effect that the representation by counsel would be contrary to ethical standards. This argument cannot withstand reasoned analysis since the claimed violations of ethical standards are based solely upon the potential conflicts of interest arising from the fact of multiple representation and the decision to present a common defense.

The record does not, nor could it, reflect the presence of any actual conflict of interest. Moreover, the record does reflect that each of the Petitioners appreciates the potential conflicts of interest which could theoretically arise from both the presentation of a common defense and representation by chosen counsel to present the common defense and that each Petitioner has knowingly, voluntarily, and intelligently chosen to secure his constitutional right to counsel of choice. Since the case at bar presents no conflicts of interest and since counsel is conflict-free, no reason existed for any Petitioner to waive his right to conflict-free counsel. And as to the

predictions of potential conflicts which are repeatedly raised by the government, such concerns are predicated on no more than the surmises of creative advocates, and not upon any facts of record.

Obviously, were it correct to premise a disqualification order solely on speculative, potential conflicts of interest which might or might not arise where persons jointly charged with a commission of criminal acts choose to present a common defense through unitary counsel, multiple representation would be absolutely barred. The potential for future conflicts of interest exists, and to the same degree, in each case in which defendants choose either to present a common defense or to be represented by a single lawyer. Yet, such conjecture, whether by the government, the trial court, or both, cannot justify the substantial and irreparable incursion into a criminal defendant's fundamental right which inevitably results from the disqualification of his chosen counsel.[14]

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14. The government's inability at this late date to even identify the potential conflicts of interest which, it contends, "lurk in every stage of the proceedings" [U.S. Br., at 54-55 and n.51], highlights the tenuousness of its position. The government merely points to the fact that counsel filed two specific pre-trial motions, neither of which has yet been determined, each of which recognizes the disparity in the quantity of "evidence" possessed by the government respecting each Petitioner. But it is apparent that no conflict exists merely because the government claims to have a larger quantity of "evidence" respecting one defendant jointly charged with other defendants. It is not the "quantity," but the "quality" of the evidence which might create a conflict. A conflict, potential or actual, would come into existence only where the specific "evidence" inculpates one defendant at the expense of another defendant.

Further, the mere fact that a motion for severance has been filed does not disclose a conflict; rather, such a motion merely acknowledges that the government possesses a greater quantity of "evidence" as to one Petitioner than it possesses respecting the other three Petitioners and that, for tactical reasons, counsel would prefer separate trials. Indeed, to the extent that the claimed "conflict" is premised upon the substance of the severance motion, that conflict is easily obliterated by the granting of the severance motion.

The government's response is unpersuasive for yet another basic reason. Even had an actual conflict of interest arising from the joint representation of Petitioners herein been demonstrated, each Petitioner did waive his right to conflict-free counsel in order to have counsel of his choice present his common defense. In their opening Brief, Petitioners noted that the Second, Fifth, and Eighth Circuits have each held that, even in the presence of actual conflict of interests arising from joint representation of defendants charged in the same action, defendants can waive that right in order to have counsel of their choice present their common defense.[15] Since Petitioners' opening Brief was filed, the Sixth Circuit, as well, has adopted this position. *United States v. Reese*, 699 F.2d 803, 805 (6th Cir. 1983). *Accord: United States v. Fox*, 613 F.2d 99, 102 (5th Cir. 1980); *United States v. Unger*, 665 F.2d 251, 256 (8th Cir. 1981).

Respondent relies on two cases for the proposition that Petitioners may not waive an actual conflict and proceed with counsel of their choice. [U.S. Br., at 58n.59] However, since neither of these cases arises in the context of defendant's desires to present a common defense, they are not only distinguishable from but are also irrelevant to the matters here at issue. *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978), as is discussed at length in Petitioners' opening Brief, at pages 20-22, arose in the context of an attorney's representation of a defendant and prior representation of a witness against

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In no event, however, do these pre-trial applications reflect an actual or potential conflict among Petitioners. Moreover, the motions have no bearing on the questions of multiple representation or each Petitioner's determination to present a common defense.

15. *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), 694 F.2d 14 (2d Cir. 1982); *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975); *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982) *cert. denied*, 103 S.Ct. 77 (1983).

that same defendant. *Dolan* did not involve common defense questions and the witness in *Dolan* refused to waive his attorney-client privilege. In *Dolan*, the defendant and the witness were antagonistic to each other and had never prepared or presented a common defense. Thus, the utilization of information derived from the attorney-client relationship could be waived only by the witness, not by the defendant. Moreover, given the fact that no common defense had ever been prepared by the witness and the defendant, no automatic waiver of the attorney-client privilege occurred. *See*, Petitioners' Opening Brief, at 40-47. Thus, *Dolan* is inapposite. Indeed, Dolan was not able to waive the actual conflict of interest in that case.

The other case cited by Respondent is *United States v. Hobson*, 672 F.2d 825 (11th Cir.), *cert. denied* 103 S.Ct. 208 (1982). *Hobson*, which held that courts of appeal have jurisdiction over pre-trial District Court orders disqualifying counsel chosen by a defendant in a criminal case and that *de novo* review existed over the District Court's conclusions of law on the disqualification issues, also held that the conflict there presented could not be waived. However, the conflict identified in *Hobson* was not one arising from the defendants' decision to present a common defense in the face of criminal charges lodged against them; rather, in *Hobson*, two government witnesses, whom the government represented would testify at Hobson's trial, had sworn to the trial court that Hobson's lawyer had been present when the potential witnesses discussed the commission of the precise criminal acts upon which Hobson was standing trial, thereby creating "a reasonable possibility of an appearance of impropriety on the attorney's part."

Faced with the facts that the lawyer would have to testify at trial, that the government's witnesses would implicate the lawyer in criminal activity, and that such witnesses did not waive any rights or privileges which

they possessed, the *Hobson* court affirmed the trial court's disqualification order.[16]

At bottom, the government's contention that Petitioners cannot insist upon joint representation by counsel of their choice rests on the government's assertion that such joint representation "does not meet established standards of ethical professional conduct." [U.S. Br. at 61.] But, throughout this entire proceeding the government has been utterly unable to demonstrate that such joint representation creates any conflict of interest or is contrary, to any degree whatsoever, to the ethical standards governing members of the Bar. Absent such a showing, the government's position collapses. The mere mouthing of generalizations concerning the purported evils of multiple representation and the citation of academic opinion condemning joint representation will not serve to justify the disqualification of counsel which occurred in this case. Likewise the abstract contention that lawyers who represent multiple defendants cannot be trusted to properly advise their clients as to the propriety or efficacy of multiple representation or of the presentation of a common defense is both wholly unsupportable and patently offensive.[17] The assertion

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16. It must be noted that the *Hobson* court emphasized the fact that Hobson was not being deprived of counsel of his choice: "[D]efendant Hobson was being represented by *two* attorneys of his choice prior to the disqualification of the attorney involved in this case. Our affirmance of the disqualification order in no way deprives Hobson of the continued representation of this other attorney. Thus, in any event, Hobson's right to counsel of choice is only partially affected by our decision." *United States v. Hobson, supra,* 672 F.2d at 829 n.*.

17. Although couched in terms of "ethical standards" and "conflict of interest" issues, the government's position is based on its express belief that a defendant lacks the ability to act in his own best interest and that counsel may fail to fully and properly advise that defendant in order to better serve counsel's personal interests. But it is troublesome to us that the paternalistic concerns advanced by the government in this case, where it is in the prosecution's best

that multiple representation fosters post-conviction attacks on a verdict is similarly irrelevant and cannot serve to justify the denigration of a defendant's constitutional right. Innumerable courts, including this Court in *Holloway v. Arkansas, supra*, have expressly recognized both the propriety and the effectiveness of multiple representation. Thus, neither the government nor the courts, except in the most exceptional circumstances, should be permitted to deprive a criminal defendant of his right to choice of counsel, his right to joint representation, or his right to present a common defense. The disqualification order must therefore be reversed.

III. THE COURTS BELOW ERRED IN DISQUALIFYING THE FIRM OF SPRAGUE & RUBENSTONE BASED ON ITS ACQUISITION OF PRIVILEGED INFORMATION THROUGH THE ATTORNEY-CLIENT RELATIONSHIP

In its Order and Opinion of December 2, 1981, the trial Court made the blanket statement that "defense counsel concedes that 'logic mandates' that the firm of Sprague & Rubenstone must be disqualified should separate counsel be ordered." In fact, counsel had only conceded that, were the Court to require appointment of separate counsel *based on the acquisition of privileged information through the attorney-client relationship,*

NOTE — *(Continued)*
interest to have the firm of Sprague & Rubenstone disqualified and to force the appointment of separate counsel, are not raised by the government in other cases where defendants' waivers of constitutional rights occur with great frequency and, in many instances, absent the presence of counsel. Furthermore, as this Court has expressly recognized, members of the Bar are the primary components through which our system operates and upon which that system is based. As a result, substantial trust has been and must continue to be placed in them. *See Holloway v. Arkansas, supra,* 435 U.S. 485-86.

then "logic would mandate that the firm be disqualified altogether."[18]

This "clarification" was accepted by the trial Court in its Order of December 4, 1981, which stated:

> "Whether or not defendants conceded, based upon the presumption that privileged information has been acquired as a result of the attorney-client relationship [citation omitted] logic does in fact mandate that, if separate counsel are ordered, Sprague & Rubenstone must be disqualified from representing even a single defendant." P.A. 30-P.A. 31.

The fallacy of the lower court's position is that the acquisition of privileged information acquired as the result of the attorney-client relationship by counsel representing multiple defendants jointly charged and presenting a common defense does not permit, much less can it mandate, the disqualification of counsel from representing one, much less all defendants. The fact is that, whether Petitioners are represented by one firm or separate firms, any privileged information shared among counsel raises the self-same potential conflict, and the price paid for sharing privileged information in a common defense situation is the waiver of the attorney-client privilege respecting that information should the common defense break down.

It necessarily follows, therefore, that the Panel Opinion serves to preclude the presentation, under any

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18. As set forth in the Motion for Clarification, granted by the District Court on December 4, 1981, counsel stated:

> "Sprague & Rubenstone extensively examined each of the defendants, jointly and separately, in connection with its representation of each client. Were the court to require appointment of separate counsel for less than all of the defendants based upon potential conflicts, Sprague & Rubenstone would still possess the same information. Were it to continue to represent only one defendant, such information obtained from all four defendants nonetheless would continue to present the same potential conflict now before this court."

circumstances, of a common defense, since a common defense necessarily hinges upon the complete sharing of privileged communications made to counsel, regardless of the number of firms representing co-defendants. Thus, while couched in terms of multiple representation, the Panel Opinion and the position of the United States actually preclude the presentation of a common defense, relying upon a procedural rule to abrogate a trial strategy which has been repeatedly approved by this Court.

Furthermore, the potential conflict arising out of the sharing of privileged information, and only this potential conflict, adheres to any criminal action in which defendants choose to have a common defense presented, whether by one or several law firms. The other "potential conflicts" discussed — opening and closing statements, sentencing, spillovers, possible grants of immunity, nature of the evidence, right to testify, character and reputation testimony (A14-A15, A42-A45) — are not conflicts in any true sense of the word. Rather, these factors represent tactical decisions which must be made by each Petitioner at the time he determines to present a common defense. Most significantly, whether one firm or four firms represent Petitioners, many of these factors are present and to the same degree. But under no circumstances can they be employed to justify the disqualification of counsel in a multiple representation case.

Were the law otherwise, serious practical and legal difficulties would necessarily ensue. Some of these difficulties will be addressed below.

A. Were The Trial And Appellate Courts Correct, There Can Be No Common Defense

As is discussed at length in Petitioners' opening Brief, in many instances in which individuals are jointly charged, strength is gained from a common defense. A common defense is more than two co-defendants adopt-

ing similar legal theories. A common defense is a fusion of co-defendants who work hand in hand to fight against the weight of the government which is brought to bear against them, in expectation that their joint strength is greater than their individual strengths standing alone. In order to best prepare and present the common defense, individual attorneys representing each defendant must have complete access to each defendant, either directly or through their counsel, for the full and frank exchange of privileged information, as if each attorney were representing every defendant, as well as to map out pre-trial investigation activities and to prepare for trial. Were the courts below correct, then each such counsel would necessarily be disqualified from representing his own client based on the obtaining of confidential attorney-client information from each of the other co-defendants. Thus, the necessary result of the holdings of the trial and appellate courts is to eradicate the possibility of preparing and presenting common defenses, for, in the absence of the full and frank disclosure to each attorney of all facts within the knowledge of every defendant, no such defense is practical.

Furthermore, were the courts below correct, the alienation of any one defendant at any point in the proceedings would require disqualification of all defense counsel, whether one attorney or several attorneys, due to their possession of privileged information.

B. Were The Courts Below Correct, There Can Never Be Multiple Representation

Since the obtaining of information through the attorney-client relationship is a primary predicate for the decisions below, it necessarily follows that no attorney can ever represent more than one defendant regardless of the nature of the offense charged or the defense to be raised. For example, if two persons charged with bank robbery were to appear in the office of an attorney stat-

ing that they had been together, out of the country, at the time of the robbery, and presented that attorney with witnesses, affidavits and documents establishing the validity of their alibi, counsel would, nevertheless, be precluded from representing either person because the information gleaned from each had been obtained during the course of the attorney-client relationship.[19]

C. Were The Courts Below Correct, Counsel Would Be Precluded From Communications With Substitute Counsel

Since the primary basis for the decision of the trial and appellate courts below was the acquisition of privileged information through the attorney-client relationship, present counsel would be precluded from meeting and/or conferring with substitute lawyers chosen by Petitioners because the communications from counsel would necessarily be based, in part, on information obtained from each Petitioner through the attorney-client relationship. As a further result, Petitioners would each be put to the payment of additional and substantial expenditures of fees to substitute counsel for the purpose of duplicating the investigative work and legal research activities which had been performed by disqualified counsel. Since scores of hours of interviews with witnesses who had knowledge of facts surrounding the challenged arrests and the persons arrested were conducted *before* federal charges were lodged against Petitioners, the exclusion of such work product from substitute counsel would be tragic. Since many of these interviewees may now not be located by substitute counsel, and since such persons, if located, may not have the clarity of memory which they possessed when contacted

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19. Were the Court below correct, Clarence Darrow would have been disqualified from representing both Leopold and Loeb and from presenting a common defense on their behalf because he had received privileged information from each of them.

by counsel at a time when the events were fresh in their minds, the exclusion of such work product is unthinkable. Yet, it is precisely that result which is compelled by the trial and appellate courts below.

The permutations are endless, and the problems caused as a result of the Opinions of the trial and appellate courts below boggle the mind. These few examples, however, point out the impracticality of the very predicate upon which these decisions are based.[20]

IV. CONCLUSION

For all of the reasons set forth above and in Petitioners' Opening Brief, the Order of the Third Circuit Court of Appeals should be reversed and the matter remanded with instructions that the trial Court proceed with pre-trial matters.

Respectfully submitted,
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20. Indeed, were the courts below correct, counsel could not even effectively interview potential clients. These persons might be involved in a matter for which the firm is already providing representation. Moreover, counsel may be barred from continuing to represent an existing client by dint of information gleaned from a prospective client whose matter, in some way, touches upon the facts resulting in the earlier representation.

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No. 82-374

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT FLANAGAN, JAMES KEWSHAN,
JOSEPH LANDIS, and THOMAS McNAMEE,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent.

IN SUPPORT OF REVERSAL

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE.....	1
STATEMENT OF FACTS.....	2
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	9
CO-DEFENDANTS HAVE A CONSTITUTIONAL RIGHT TO BE REPRESENTED BY COUNSEL OF THEIR CHOICE, EVEN IF THEY CHOOSE TO BE REPRESENTED BY THE SAME LAWYER OR LAW FIRM.....	9
A. It Is up to Each Defendant, Not the Courts or the Government, To Choose How To Conduct His Defense.....	10
B. A Knowing, Intelligent, and Voluntary Waiver of Each Defendant's Right to Individual Counsel Serves the Interests of Defendants Without Compromising the Legitimate Interest of the Trial Court and the Government.....	17

Page

1. The Knowing, Intelligent and Voluntary Waiver of Each Defendant's Right to Individual Counsel Allows the Defendants To Exercise Their Right To Decide How To Conduct Their Defense..... 18

2. A Knowing, Intelligent, and Voluntary Waiver Protects the Trial Court's Legitimate Interests in Avoiding Delay, Needless Retrials after Convictions, and Any Appearance of Unfairness..... 36

3. A Knowing, Intelligent and Voluntary Waiver of the Right to Individual Counsel Satisfies the Government's Interests in Preventing Convictions From Being Overturned and in Doing Justice.... 49

CONCLUSION..... 57

TABLE OF AUTHORITIES

CASES: PAGE

Adams v. United States, ex rel. McCann, 317 U.S. 269 (1942).....6,10-11,12

Berger v. United States, 295 U.S. 78 (1935)..... 51

Cuyler v. Sullivan, 446 U.S. 335 (1980).....34, 43-44

Edwards v. South Carolina, 372 U.S. 229 (1963)..... 31

Faretta v. California, 442 U.S. 806 (1975).....11-13,38

Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963)..... 31

Gideon v. Wainwright, 372 U.S. 335 (1963)..... 25

Glasser v. United States, 315 U.S. 60 (1942).....15,26-27

In The Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F.Supp. 381 (S.D.N.Y. 1975).....30

Holloway v. Arkansas, 435 U.S. 475 (1978).....6,14-15, 20,26,34, 37,44

CASES: PAGE

North Carolina v. Alford, 400 U.S. 25 (1970)..... 38

Powell v. Alabama, 287 U.S. 45 (1932)..... 21

United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982)..... 46

United States v. Curcio, 680 F.2d 881 (2d Cir. 1982)..... 46

United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978).....5,40,54

United States v. Garcia, 517 F.2d 272 (5th Cir. 1975)..... 46

United States v. Kuzma, 141 F. Supp. 619 (E.D. Pa. 1954)..... 20

United States v. Kuzma, 249 F.2d 619 (3d Cir. 1957)..... 20

United States v. Laura, 607 F.2d 52 (3d Cir. 1979)..... 21,23

FEDERAL RULES:

Fed.R.Crim.P. 44(c).....2,9,10, 39,41

CONSTITUTION: PAGE

Fifth Amendment.....5,11-12, 15

Sixth Amendment.....5,11,12, 15,20,55

CODE OF PROFESSIONAL RESPONSIBILITY:

Disciplinary Rules
DR 5-105,
DR 5-105(c).....42-45,48-49

Final Draft of the Model Rules of Professional Conduct Rule 1.7 Comment: Conflict Charged by Opposing Party...44,53

OTHER AUTHORITIES:

Attorney for the Damned (Arthur Weinberg ed. 1957)..... 19,28

The Constitution of the United States: Analysis and Interpretation (United States Government Publishing Office 1972)..... 21

PAGE

A. Lewis, Gideon's Trumpet (Random House 1964).. 25

P. Vaira & D. Huyett, Time For A Rule Certain: A Proposal to End Representation of Multiple Grand Jury witnesses 85 Dick. L. Rev. 381 (1981)... 55

INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization with over 250,000 members dedicated to the protection of the civil rights and liberties of Americans. Foremost among the rights the constitution guarantees to those against whom the state arrays its power through the criminal justice system are the right of a defendant in a criminal case to counsel of his own choosing, and the right to prepare and execute the defense he thinks most appropriate. The ACLU submits this amicus curiae brief to urge the Court to protect the sanctity of these rights.

STATEMENT OF FACTS

Although the facts of this case are set forth more fully in petitioners' brief, amicus will briefly highlight the facts which it believes to be essential to disposition of the case.

Petitioners have each been indicted for alleged criminal conduct as members of the same police decoy team; they have each denied the charges brought against them; each sought counsel from the law firm of Sprague and Rubenstone before being indicted; and each wished to proceed with this same firm at trial. The government, however, filed a Motion for a Hearing and to Prohibit Multiple Representation under Fed. R. Crim. P. 44(c), seeking to disqualify Sprague and

Rubenstone from representing petitioners.

The district court held a hearing on the government's motion during which it questioned each petitioner fully and completely concerning his reasons for choosing to be represented by the same law firm as his co-defendants. In addition, the court advised each petitioner of the risks resulting from the decision to proceed with joint counsel. Each petitioner indicated his continued desire to be represented by the common counsel they all had chosen.

Following this full and complete hearing, the district court found that (1) no actual conflict of interest existed; (2) a conflict of interest was likely to arise; and

(3) each defendant had made an intelligent, knowing, and voluntary waiver of any claim of conflict of interest and had done so without financial pressure. The court, however, refused to allow petitioners to proceed with single representation and disqualified Sprague and Rubenstone from representing any of petitioners. The court based its ruling that petitioners could not be represented by Sprague and Rubenstone upon the competing interest of the "court's responsibility to supervise the professional conduct of attorneys practicing before it," which it held outweighed petitioners' rights to conduct a common defense with counsel of their choice. 527 F. Supp. at 906, A21.

The district court's order was affirmed by the court of

appeals which held that aside from the court's interests in not having convictions overturned on appeal because of ineffective representation of counsel--a concern which does not exist if defendants knowingly, intelligently, and voluntarily waive their right to conflict free counsel--the trial court might act on "concerns about breaches of professional ethics and about respect for the integrity of the Court." 679 F.2d at 1076, A10, citing United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978).

SUMMARY OF ARGUMENT

The procedural safeguards of the fifth and sixth amendments are facets of an underlying guarantee to those accused in federal criminal prosecutions of a right to

present their best legitimate defense. Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942). Petitioners have a legitimate interest in selecting particular counsel to present a joint defense. This interest goes to the heart of their right to present their best defense.

While petitioners also have a constitutional right to individual counsel, unaffected by a conflict of interest, this right may be waived. Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978). When the constitutional rights guaranteed by the fifth and sixth amendments come into conflict, the general purpose served by those amendments requires the court, absent compelling countervailing considerations, to defer to the judgment of the accused.

Here, petitioners have waived the right to individual counsel in order to exercise their right to pursue the defense strategy of their choice, by the tactics of their choice, with the counsel of their choice.

The only legitimate interests of the court and the government in petitioners' decision to pursue a common defense by joint counsel are served by a knowing, intelligent, and voluntary waiver of the right to separate counsel.

The court's interests in avoiding delay, needless retrials after convictions, and any appearance of unfairness are satisfied by a knowing, intelligent, and voluntary waiver of separate representation. The pursuit of a common defense by single counsel is more, not

less, efficient. A knowing, intelligent, and voluntary waiver of the right to separate counsel insulates a conviction from attack based upon a claim of infringement of that right. The court's third interest, in assuring that the proceedings before it both are fair and appear fair, is served by acceptance of such a waiver after hearing since it guarantees both that defendants' choice of a defense will be honored and that counsel will be aware of their responsibilities to both their clients and the court.

The government's interests in ensuring that convictions are not overturned because of ineffective assistance of defense counsel and that justice is done are satisfied by the knowing, intelligent, and

voluntary waiver. Moreover, a motion by the government to disqualify counsel may have an illegitimate purpose of preventing the accused from pursuing their best defense. It is for that reason that Rule 44(c) calls for the trial court to act on its own motion rather than on the motion of the government which has its own unwaivable conflict of interest when it seeks to disqualify defense counsel for the sake of the defendant.

ARGUMENT

CO-DEFENDANTS HAVE A CONSTITUTIONAL RIGHT TO BE REPRESENTED BY COUNSEL OF THEIR CHOICE, EVEN IF THEY CHOOSE TO BE REPRESENTED BY THE SAME LAWYER OR LAW FIRM

There are two basic reasons why petitioners and all defendants similarly situated should be

permitted to be represented by common counsel after a proper Rule 44(c) colloquy. First, when constitutional rights conflict, it should be the defendant, who will bear the consequences, and not the court or government, who should decide which right to exercise and which to waive. Second, a proper waiver of individual representation protects the interests of both the courts and the government.

A. It Is up to Each Defendant, Not the Courts or the Government, To Choose How To Conduct His Defense.

It is fundamental that a defendant is entitled to conduct not merely a defense against criminal charges, but "his best defense." Adams v. United States ex rel.

McCann, 317 U.S. 269, 279 (1942). It is further fundamental that it is the defendant, and not the government or the court, who decides what is the "best" defense in any particular case, for "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." Faretta v. California, 422 U.S. 806, 833-34 (1975) (footnote omitted).

An accused's constitutional right to present his "best defense" encompasses the right to pursue a defense strategy of his choosing, to employ those tactics he believes are best designed to effectuate that strategy, and to choose his own lawyer to conduct that defense. Each of the specific guarantees of the fifth and sixth amendment is designed

to effectuate this general purpose--that is, to allow the defendant to conduct his defense in the manner in which he deems best. See Faretta v. California, supra, 422 U.S. at 834. These individual rights were not adopted in a vacuum; rather, they dovetail together to guarantee to those accused in a criminal prosecution a right to present what he believes is his best legitimate defense. Adams v. United States ex rel. McCann, supra, 317 U.S. at 279.

While the different fifth and sixth amendment guarantees complement each other in most cases, there are situations in which the preservation of one right may prevent the full exercise of another. Since each of these rights was created to protect the defendant, when this conflict occurs, it is up to

the defendant to choose which right to forego in order to maximize the other, as this Court has recognized time and again. In Faretta v. California, supra, 422 U.S. at 834 (footnote omitted) (emphasis added), this Court stated:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the

> State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." Illinois v. Allen, 397 U.S. 337, 350-51.

Thus, acceptance of the knowing and intelligent waiver of a specific right serves merely to effectuate the defendant's overriding right to conduct the defense of his own choosing, whether or not the court may think the choice a wise one.

Here, the right of each defendant to conduct his defense as he believes best conflicts with his right to individual counsel. There is no question that defendants have an absolute right to retain separate

counsel. See Holloway v. Arkansas, supra; Glasser v. United States, 315 U.S. 60 (1942). But there is also no question that a defendant in a criminal case may waive that right to individual counsel. Holloway v. Arkansas, supra, 435 U.S. at 483 n.5.

The courts below and the government suggest that existence of conflicting constitutional rights is so unusual that the trial court must exercise its supervisory power over how a defendant resolves the conflict. Such a conflict, however, is present in every trial. The fifth and sixth amendments give a defendant the right to testify on his own behalf as a part of his defense. But the fifth amendment also gives a defendant an absolute right to remain silent. The defendant

chooses, free of the court's supervision, which right to exercise to maximize his defense. In fact, when a defendant decides whether to testify, the trial court does not even conduct a colloquy to determine whether the choice of which right to waive is knowing, intelligent, and voluntary, depending, instead, on the defendant and his counsel to make the choice. In this case, by contrast, both the court and counsel questioned each defendant on the record and under oath to ensure that he understood the exact consequences of his decision to waive his right to individual counsel.

B. A Knowing, Intelligent, and Voluntary Waiver of Each Defendant's Right to Individual Counsel Serves the Interests of Defendants Without Compromising the Legitimate Interest of the Trial Court and the Government.

The sole question which the Court must decide in this case is whether a court may reject a defendant's decision to waive his right to individual counsel free of potential conflicts when that waiver is knowing, intelligent, and voluntary. Amicus submits that such a waiver must be accepted by the court because it fulfills each defendant's right to conduct a defense of his own choosing. In this case, a review of the legitimate interests of the government and the trial court reveals that none of those interests is compromised by accepting each defendant's

waiver of his right to individual counsel. Indeed, review of the specific interests of the trial court and the government confirms that acceptance of such a waiver enhances the specific interests of all involved.

1. The Knowing, Intelligent and Voluntary Waiver of Each Defendant's Right to Individual Counsel Allows the Defendants To Exercise Their Right To Decide How To Conduct Their Defense.

While individual counsel for each defendant may best serve each defendant in some cases, this is clearly not true in every case. Historically, joint representation has been effectively employed in a

wide variety of situations. Clarence Darrow, for instance, effectively represented multiple defendants in instances when they all alleged their innocence--as in the trial of Haywood, Moyer, and Pettibone for the murder of Idaho Governor Frank Steunenberg--and when they both admitted their guilt--as in the trial of Leopold and Loeb for the murder of Bobby Franks. See Attorney For the Damned 16-88, 410-88 (Arthur Weinberg ed. 1957). Similarly, joint representation by a trial team headed by Thomas D. McBride and Joseph A. Lord, 3d, was effectively employed when multiple defendants, charged with different violations of the Smith Act, nonetheless maintained their innocence because the substantive offenses of

which they were charged were unconstitutional. See United States v. Kuzma, 249 F.2d 619 (3d Cir. 1957); United States v. Kuzma, 141 F. Supp. 619 (E.D. Pa. 1954). Indeed this Court has recognized that not only can "multiple defendants . . . [be] appropriately . . . represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation." Holloway v. Arkansas, supra, 435 U.S. at 482-83.

The sixth amendment's guarantee of effective assistance of counsel entails many elements in addition to the right to counsel free of potential conflicts. Other facets of effective assistance of counsel include the confidence counsel engenders in his client, the capacity of counsel to communicate with his client, and the peculiar ability to

present the defense sought by his client. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932); United States v. Laura, 607 F.2d 52 (3d Cir. 1979); see also The Constitution of the United States: Analysis and Interpretation, 1221 (U.S. Government Printing Office 1972). The reasons why an individual might select the same counsel to conduct his defense as has been selected by his co-defendants are both personal and strategic. In either case, they are legitimate and must be recognized to be part of a defendant's right to choose how to conduct his own defense.[1]

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1. Amicus does recognize that a defendant has no right to demand a particular counsel when he cannot afford that lawyer or when that lawyer is unavailable

(footnote continued on next page)

There are a number of reasons why several defendants in a case may choose the same person as their lawyer. Courts have recognized that not all lawyers are equal. The Court of Appeals for the Third Circuit itself stated:

> "We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular

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> for the representation or declines to accept the representation for any reason. However, these considerations have no bearing in this case since petitioners' chosen counsel, Sprague and Rubenstone, has agreed to represent them and remains ready to do so. Thus, the issue is whether the court can upset each petitioner's choice of counsel when that counsel is prepared to proceed.

> legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of a defense. It is generally the defendant's right to make a choice from the available counsel in the development of his defense. Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the sixth amendment." United States v. Laura, supra, 607 F.2d at 56.

Thus, several defendants may seek the same lawyer in a case because that lawyer's skills are suited uniquely to the particular facts of that case.

There are also a number of purely personal considerations which affect extremely significant intangible aspects of a lawyer-client relationship. An accused may not

trust any but one particular counsel. This confidence may be born of prior experiences with counsel, political considerations, social background, linguistic expertise, or ethnic roots. Whatever reasons foster the client's confidence in the attorney-client relationship, they are a part of the guarantee of effective assistance of counsel and are not inconsequential considerations.

Further, each defendant in a case may decide that he can conduct his "best defense" by pooling his financial resources with those of other defendants to hire one extremely specialized or especially competent trial lawyer rather than two or more less able, less costly advocates. While the trial court may find it easier to deal with

separate counsel and the government might prefer to try the case against a large number of less experienced lawyers, it is the defendant's right to decide how to conduct his defense which should govern who serves as counsel. Moreover, it is likely that in some smaller communities the pool of attorneys experienced in handling criminal matters is so limited that in some cases co-defendants may be compelled to hire the same lawyer to get even minimally competent counsel.[2]

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2. Out-of-town counsel may be no answer. Clarence Earl Gideon's acquittal after he won the right to be represented by counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), has been attributed to his decision to reject an offer of representation of outstanding Miami counsel in favor of local counsel from Panama City who knew the community and its people. See A. Lewis, Gideon's Trumpet 223-38 (Random House, 1964).

Second, there are strategic reasons separate and apart from the individual characteristics of the lawyer sought by multiple defendants which justify defendants hiring the same lawyer. Each defendant may decide it is in his best interest to participate in a common defense conducted by common counsel. The prudence of this strategy in the appropriate case has been recognized by this Court:

> In Mr. Justice Frankfurter's view: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack."

Holloway v. Arkansas, supra, 435 U.S. at 482-83, quoting Glasser v. United

States, supra 315 U.S. at 92 (Frankfurter, J. dissenting).[3]

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3. The advantages of a common defense, moreover, are not limited to situations in which all defendants assert their common innocence. Clarence Darrow effectively employed joint representation in his defense of Leopold and Loeb for the kidnapping and murder of Bobby Franks. The two defendants' participation and culpability in these crimes differed: Richard Loeb, the younger of the two boys, was the leader, obsessed with a desire to commit a "perfect crime" and wielded the chisel which ended Bobby Frank's life; Nathan Leopold, the older of the two, fed Loeb's schemes with his cooperation and approval. A potential conflict clearly existed. Separate counsel could have been expected to show that the other defendant was the more evil, the more culpable, the more deserving of punishment, to the ultimate detriment of both. Darrow instead demonstrated not how one defendant was better or worse than the other, but how the crimes which they committed together were the result of an evil which was greater than the sum of their individual weaknesses. Because

(footnote continued on next page)

There are also a number of practical reasons why defendants who have chosen to conduct a common defense would also decide to proceed with one lawyer to conduct that defense. The defendants may feel that it is in their best interest to not have numerous lawyers on their side of the courtroom against a single prosecutor. Even if the separately-represented defendants could choose one lawyer to conduct all cross-examination, the jury may be bewildered by the fact that counsel for

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(Footnote continued from previous page)

> Darrow showed how their crime was the result of a peculiar marriage of their undeveloped personalities, he was able to save them both from the gallows. Attorney For the Damned 16-88 (Arthur Weinberg, ed. 1957) This defense was effective, ethical, and would have been barred if the lower courts in this case had been then sitting in Illinois.

the other defendants do not ask any questions. Again, the use of common counsel guarantees unitary leadership. In short, the defendants pursuing a common defense may well decide that too many lawyers spoil the case.

Common counsel also ensures that all communications made by the individuals to their lawyers are protected by the attorney-client privilege. Ideally, all defendants would confer with all counsel in preparing a joint defense, but this course would invite a government challenge to the privilege. If each defendant communicates only with his own counsel in order better to protect the privilege, there is a danger of miscommunication or misunderstanding through the additional step which would be necessary if the various lawyers then gather to prepare the

common defense. Further, the government has taken the position in a number of cases that communication between lawyers in the same case results in a waiver of the attorney-client privilege with respect to the subject of that communication. See, e.g., In the Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 387 (S.D.N.Y. 1975). While some courts have recognized that the communication among defense counsel in pursuit of a common defense is protected by the attorney-client privilege, there is no guarantee that this will be true.

Finally, there are important associational and political reasons why several codefendants might wish to stand together with one defense team. It may be that it is more important to each defendant

in some cases to test a law's validity than to avoid punishment for its violation. Thus, groups of people or organizations who find themselves or their purpose threatened by a statute may decide that it is more important to challenge the act or its application than the government's proof of its violation. See, e.g., Edwards v. South Carolina, 372 U.S. 229 (1963); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963).

More important to the facts of this case, there are occasions when individual acquittal would mean less to a defendant than vindication of his group. For example, members of a union executive committee, a corporate board of directors, a town council, or a police squad may find that their good names would be damaged by

a showing through the conviction of some members that the group was corrupt, even though an individual member might be acquitted on a showing that he had been duped or that the charges against him were barred on technical grounds. Particularly where, as here, all of petitioners maintain their innocence, they have a legitimate interest in sticking together to vindicate the honor of their squad, their force, and their profession. See A72-74.

Both personal and strategic reasons for proceeding with the same law firm were here cited by petitioners in their colloquies. Robert Flanagan informed the court that he chose to remain with Sprague and Rubenstone as his lawyers because he had developed confidence in their

abilities throughout the representation. Further, Flanagan specifically noted that he was "comfortable" with the manner in which the representation had been handled to date. A.68. Strategic reasons for proceeding with the same lawyer were relied upon by the three other petitioners. Each informed the court that he believed he was in the same position with respect to the government's charges as were his partners. Therefore, each felt it was in his individual best interest to pursue the common defense through a single lawyer. A.68-74.

Each petitioner decided that since the defense that he desired to present was consistent with that desired by each of the others, his personal confidence in Sprague and Rubenstone and the practical considerations involved with dealing

with one lawyer and having one lawyer appear as spokesman for all in court outweighed any theoretical disadvantages which might be associated with the potential for conflict of interest which is present when a lawyer represents more than one co-defendant.

This Court has recognized that multiple representation is not per se ineffective representation. See Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); Holloway v. Arkansas, supra. It is up to the defendants to weigh the advantages and disadvantages associated with the choice to proceed with the same counsel, so long as that decision is made knowingly, intelligently, and voluntarily. Once defendants have articulated a rational reason for proceeding with joint counsel, the

trial court must defer to their judgment.

It is not the trial court's duty to decide whether each defendant is best served in the court's view by that defense. The trial court need only assure itself that the decision was arrived at knowingly, intelligently, and voluntarily. If a defendant articulates a rational reason for his choice, the trial court has no business second-guessing that choice--the defendant, not the court, is on trial. This is particularly true when each of the trial court's interests is satisfied completely once it has assured itself that the defendant's decision to waive his right to individual counsel was made knowingly, intelligently, and voluntarily.

2. A Knowing, Intelligent, and Voluntary Waiver Protects the Trial Court's Legitimate Interests in Avoiding Delay, Needless Retrials after Convictions, and Any Appearance of Unfairness.

The trial court has a threefold interest in the conduct of criminal trials before it. First, the court has an interest in avoiding delay so that it may proceed with its docket. Second, the court has an interest in avoiding attacks on convictions and needless retrials after the court has expended its resources in conducting a trial. Third, the court has an interest in ensuring that justice is done and that it is done with an appearance of fairness. Acceptance of a knowing, intelligent, and voluntary waiver of a defendant's

right to individual counsel satisfies all of these interests.

The use of single counsel is likely to be more efficient in a case involving multiple defendants. As Justice Powell noted in his Holloway dissent:

> "Each addition of a lawyer in the trial of multiple defendants presents increased opportunities for delay in setting the trial date, in disposing of pretrial motions, in selecting the jury, and the conduct of the trial itself. Additional lawyers also may tend to enhance the possibility of trial errors." Holloway v. Arkansas, supra, 435 U.S. at 494 n.2.

The trial court's interest in expediting proceedings is, therefore, actually served by a waiver of separate representation.

The trial court's interest in avoiding needless retrials because

convictions are overturned is served by a knowing and intelligent waiver of the right to separate counsel. This Court has made it clear on numerous occasions that a knowing, intelligent, and voluntary waiver of a right insulates a conviction from attack based upon a claim of infringement of that right. See, e.g., Faretta v. California, 422 U.S. 806 (1975) (waiver of counsel); North Carolina v. Alford, 400 U.S. 25 (1970) (waiver of trial and plea of guilty).

The court's interest is in assuring that the proceedings before it not only are fair but appear fair is reflected in the manner in which the court deals with the defendant directly. Here, the court had a full and complete colloquy with each petitioner about his decision to retain the Sprague and Rubenstone law firm.

This colloquy included disclosure by defense counsel of their discussions with each petitioner of the specific matters which might be affected by that individual's choice of representation by the common law firm. After this colloquy, each petitioner reaffirmed his choice of Sprague and Rubenstone as his counsel. Indeed, to deny defendants the right to proceed with counsel of their choice after such a colloquy not only appears unfair; it is unfair. It makes a mockery of the entire proceeding as it denies defendants their choice of counsel even though the court is satisfied with the choice was made freely and intelligently.

Rule 44(c) of the Federal Rules of Criminal Procedure mandates just such a colloquy as the district court conducted in this case. It

then requires that, unless it appears that a conflict of interest is not likely to arise, "the court shall take such measures as may be appropriate to protect each defendant's right to counsel." That is, the Rule's purpose is not to deny defendants their choice of multiple representation but to provide a mechanism to be sure that multiple defendants will not be denied their right to counsel.

As the notes of the Advisory Committee on Criminal Rules make clear, citing United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978), an order requiring separate counsel "may be necessary where the trial judge is 'not satisfied that the waiver is proper.'" Examples cited include defendants of limited competence and defendants in cases where no one can

foresee the prejudices of multiple representation. The trial judge found no such limitations in the waiver in this case.

Nor is there a danger that multiple representation in this case will cause counsel to violate the standards of legal ethics, even if ethical considerations would sometimes permit a court to deny a defendant the constitutional right to competent counsel of his choice. Indeed, the Code of Professional Responsibility, like Rule 44(c), is aimed at protecting the right to counsel, not at limiting it.

Moreover, the Canons of Ethics and the Disciplinary Rules of the Code make it clear that joint representation need not be unethical representation. The Disciplinary

Rules specifically permit joint representation when a lawyer concludes that he can adequately represent the interest of each defendant and "each [defendant] consents to the representation after full disclosure of the possible effect of such representation . . . ." DR 5-105(c)

There is no question in this case that each petitioner chose to proceed with common counsel after the possible effects of multiple representation in each individual's case were discussed fully with him. An ethical violation could have occurred, if at all, therefore, only if the second prong of the Disciplinary Rule's test was not met--that is, if counsel could not "adequately represent the interest of each" of these petitioners, a determination left to

counsel by DR 5-105. Obviously, counsel here found that they could adequately represent the interest of each since they proceeded with the representation.

Ordinarily, the court abides by "the good faith and good judgment of defense counsel" in deciding to undertake a joint representation. Cuyler v. Sullivan, supra, 446 U.S. at 347. In fact, only defense counsel and defendant are in any position to evaluate fully the impact of joint representation on that defendant's case. The prudence of multiple representation must be viewed on a case-by-case, individual-by-individual basis. This review can only be taken after analysis of all the facts available in a particular case. The attorney for the defendants is the only one in a position to gather these

facts before trial. Thus, this Court has acknowledged an attorney representing multiple defendants is in the best position professionally and ethically to determine when a conflict of interest exists which will impair his ability to represent each client adequately. See Cuyler v. Sullivan, supra, 446 U.S. at 347; Holloway v. Arkansas, supra, 435 U.S. at 485. See also Final Draft of the Model Rules of Professional Conduct Rule 1.7 Comment: Conflict Charge by Opposing Party.

Moreover, the prompt inquiry required by Rule 44(c) makes it even more difficult for a trial court to determine either the probability of a conflict or the likelihood that common counsel will be unable to represent the interests of all defendants adequately should such

a conflict occur. At that point, the court is likely to know no more about the case than the facts which appear in the indictment on information.

Even counsel may not know what conflicts, if any, will occur between the positions on which his clients may find themselves as the case progresses. What counsel and clients can have done, however, is to explore potential conflicts and to determine whether, knowing of these conflicts, the clients want to proceed with common counsel. If the clients do want to conduct their defense through common counsel, D.R. 5-105(c) requires counsel to determine whether he can effectively represent the interests of all his clients. If he cannot, the Code prohibits him from continuing with the multiple representation.

If counsel does continue to represent more than one co-defendant, the court can and must then determine whether there is an actual or potential conflict which has not been knowingly and intelligently waived.[4] It can also question counsel on his awareness of his ethical obligation not to undertake a representation in

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4. Amicus submits that a trial court would have to accept a defendant's knowing, intelligent, and voluntary waiver of his right to conflict-free counsel even when there is an actual conflict. See, e.g., United States v. Curcio, 680 F.2d 881 (2d Cir. 1982); United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975). Although that issue is not before this Court in this case since the district court found no actual conflict, the same considerations discussed in this brief would apply to actual as well as potential conflicts.

which he cannot effectively represent the interests of all his clients.

On the other hand, even if it wants to protect defendants against an unwise waiver of individual counsel, the court cannot hope to do an intelligent job of second guessing counsel's determination that he is capable of effectively representing the interests of multiple defendants. Since that decision can only be made on the basis of knowledge which is peculiar to counsel and defendants, the court must rely on the operation of the disciplinary procedures upon the rare lawyer who improperly undertakes a joint representation. It cannot use the possibility that some lawyer somewhere has unethically undertaken a representation in which he cannot further the interests of all of his clients as an

excuse for denying all multiple defendants the right to make a conscious and perhaps wise choice to proceed with common counsel.

In sum, every legitimate interest of the court is satisfied by a knowing, intelligent, and voluntary waiver of each defendant's right to individual counsel. The court's interest in avoiding delay is actually served by single defense counsel. Further, the court's concern in avoiding the overturning of convictions on the basis of ineffective assistance of counsel is protected fully by the knowing, intelligent, and voluntary waiver. Finally, acceptance of the knowing and intelligent waiver after a proper Rule 44(c) colloquy ensures the fairness and appearance of fairness in the trial; indeed rejection of the waiver is and appears arbitrary.

Therefore, a defendant's knowing, intelligent, and voluntary waiver of the right to separate representation must be accepted.

3. A Knowing, Intelligent and Voluntary Waiver of the Right to Individual Counsel Satisfies the Government's Interests in Preventing Convictions From Being Overturned and in Doing Justice.

The constitution guarantees every defendant the right to counsel. The courts are concerned with seeing to it that the right is effectuated. Where multiple representation is involved, Rule 44 (c) directs the trial court to make inquiry, sua sponte, into the danger to effective assistance of counsel posed by the use of common counsel. Neither the constitution nor Rule 44(c), however, gives

the government responsibility for determining who shall represent a defendant in a criminal case, and any attempt by the prosecutor to control what counsel shall oppose him is inherently suspect.

That is not to say that the government has no legitimate concern in who may represent a defendant in a criminal case. In any criminal proceedings, the government has an interest in convicting the guilty and in preventing those convictions from being overturned after trial. Ineffective assistance of counsel is a frequent basis for retrials. As noted above, however, the knowing, intelligent, and voluntary waiver of separate counsel ensures that convictions legitimately obtained will not be

overturned on the grounds of ineffective assistance of counsel due to joint representation.

The government has a second interest in ensuring that justice shall be done. In Berger v. United States, 295 U.S. 78, 88 (1935), this Court established the standard:

> The United States Attorney . . . . is in a particular and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The government's interest in justice is in fact enhanced by the waiver since it permits each

defendant to proceed with the defense of his choosing. In this case, the government's interest in doing justice would be jeopardized if petitioners may not proceed with the joint representation because, for the reasons stated above, the court would be impinging upon petitioners' ability to present their best defense.

Since the government's legitimate interests are protected fully by a knowing, intelligent, and voluntary waiver of a defendant's right to individual counsel, any efforts by the government to disqualify counsel notwithstanding that waiver must be viewed with suspicion. Indeed, this Court should be sensitive to the fact that any motion to disqualify opposing counsel may be motivated by illegitimate reasons completely unrelated to

the pursuit of justice. The ABA Commission on Evaluation of Professional Standards has cautioned that:

> Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be used as a technique for harassment. Final Draft of the Rules of Professional Conduct, Rule 1.7 Comment: Conflict Charge by an Opposing Party.

The government does not have a legitimate interest in second-guessing the decision of defense counsel or the defendants.

Nor does the government have a legitimate interest in disqualifying a particular lawyer to facilitate its task of proving guilt in a particular case. This, however, seems to have been part of the motivation

which persuaded the Court of Appeals for the Third Circuit to conclude that joint representation should be prohibited in United States v. Dolan, 570 F.2d 1177, 1182 (3d Cir. 1978):

> ...there are public interests which impel an attorney's withdrawal from representing multiple defendants absent a knowing and intelligent waiver. Joint representation creates the possibility of defendants 'stone-walling'--obstructing Government attempts to obtain cooperation of one of a group of defendants.

While there may be an additional concern with establishing that each of the defendants really has made a personal and knowing choice of common counsel when even those co-defendants who might benefit from cooperating with the government refuse to do so, the rationale of Dolan seems to be that the government has a legitimate

interest in the ease with which it obtains convictions which the court may consider in determining whether to allow joint representation. That rationale is directly contrary to each defendant's right to conduct and manage a defense of his own choosing as guaranteed by the sixth amendment.[5]

Finally, if the government believes that waiver is not fully informed, it should not be able to rest merely upon the allegations of the

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5. The United States Attorney for the district in which this case was brought is a vigorous opponent of multiple representation. See P. Vaira & D. Huyett, Time for a Rule Certain: A Proposal to End Representation of Multiple Grand Jury Witnesses, 85 Dick. L. Rev. 381 (1981). Remarkably, defense counsel, who do represent the interests of defendants and who have the most to gain from an absolute bar against multiple representation, appear to have written none of the articles which attack that practice.

indictment or information and platitudes offered in its memorandum of law in support of the motion to disqualify. If the government has specific information that the evidence to be presented in its case is likely to create actual conflicts of which defendants may not be aware, the government should make that information available to the court as soon as possible. This will ensure that everyone's interest in a knowing and intelligent waiver is served since each defendant will be able to make a more informed choice as to how he wishes to proceed. No such offer was made by the government in this case.

In short, a knowing, intelligent, and voluntary waiver satisfies every legitimate interest of the prosecutor. The fact that the prosecutor seeks to require more of

a defendant than this waiver creates the strong likelihood that the government's motivation in seeking to disqualify counsel extends beyond its interest in seeing that justice is done.

CONCLUSION

Since the interests of defendants, court, and government are satisfied fully by a knowing, intelligent, and voluntary waiver of each defendant's right to individual counsel, each petitioner must be permitted to proceed with counsel of his choice to conduct the defense of his choice. Accordingly, the order of court below affirming the order of the trial court

disqualifying counsel should be reversed and the matter remanded for trial.

Respectfully submitted,

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ROBERT FLANAGAN, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Sixth Amendment prohibit a court from overriding an accused's voluntary, knowing and intelligent choice to conduct his defense through joint counsel?

TABLE OF CONTENTS

PAGE

Table of Authorities v

Interest of Amici 2

Constitutional Provision 2

Statement 3

Summary of Argument 6

Argument 9

I. The Sixth Amendment Prohibits A Court From Disqualifying Joint Counsel, Pursuant To Its Authority To Supervise The Conduct Of Attorneys, Over An Accused's Knowing Waiver Of Potential Conflicts Of Interest 9

A. Fed. R. Crim. P. 44(c) Cannot Be Interpreted To Infringe The Accused's Right To Conduct His Defense Through Joint Counsel 9

B. The Sixth Amendment Protects The Accused's Right To Conduct His Defense By Selection Of Joint Counsel 12

1. The accused's right to conduct his defense through joint counsel is an independent right 12

PAGE

2. Sixth Amendment protection of the accused's right to conduct his defense through joint counsel is absolute 14

C. Joint Representation Does Not Violate The Model Code Of Professional Responsibility 15

1. The Model Code of Professional Responsibility requires the client's waiver 16

2. The courts erred in finding that an ethical conflict existed and that disqualification was justified on the record in this case 18

D. The Court Cannot Insist Upon Protecting The Accused From Theoretical Prejudice That He Has Waived 21

Conclusion 26

TABLE OF AUTHORITIES

Cases

PAGE

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 24

Andersen v. Treat, 172 U.S. 24 (1898) 13

Betts v. Brady, 316 U.S. 455 (1942), *overruled Gideon* v. *Wainwright*, 372 U.S. 335 (1963) 15

Brady v. United States, 397 U.S. 742 (1970) 11

Brooks v. Tennessee, 406 U.S. 605 (1972) 13

Cuyler v. Sullivan, 446 U.S. 335 (1980) 10

Davis v. Stamler, 650 F.2d 477 (3d Cir. 1981) 14

Faretta v. California, 422 U.S. 806 (1975) 12, 15, 23, 24

Gideon v. Wainwright, 372 U.S. 335 (1963) 15

Glasser v. United States, 315 U.S. 60 (1942) 10, 11, 13, 17, 22

Holloway v. Arkansas, 435 U.S. 475 (1978) 17, 22

Johnson v. Zerbst, 304 U.S. 458 (1938) 11

Norton v. Tallahassee Memorial Hospital, 689 F.2d 938 (11th Cir. 1982) 19

Powell v. Alabama, 287 U.S. 45 (1932) 14, 15

Singer v. United States, 380 U.S. 24 (1965) 23

United States v. Agosto, 675 F.2d 965 (8th Cir.), *cert. denied, sub nom. Gustafson* v. *United States*, 103 S.Ct. 77 (1982) 19, 21, 22

United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978) 22

United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975) 22

PAGE

United States v. Cox, 580 F.2d 317 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979) 22

United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982) 21, 22

United States v. Curcio, 694 F.2d 14 (2d Cir. 1982) ..13, 18, 22, 24

United States v. Curcio, 680 F.2d 881 (2d Cir. 1982) 13, 22

United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978) 16

United States v. Dorfman, 542 F.Supp. 402 (E.D. Ill. 1982) 20

United States v. Flanagan, 679 F.2d 1072 (3d Cir. 1982) 2, 8

United States v. Garcia, 517 F.2d 272 (5th Cir. 1975) 22, 24

United States v. Hobson, 672 F.2d 825 (11th Cir.), *cert. denied*, 103 S.Ct. 208 (1982) 26

United States v. Laura, 607 F.2d 52 (3d Cir. 1979) 13

United States v. Mers, No. 81-7777, slip op. (11th Cir. Mar. 21, 1983) 19

United States v. Miller, 624 F.2d 1198 (3d Cir. 1980) 21

United States v. Ostrer, 597 F.2d 337 (2d Cir. 1979) .. 21

United States v. Reese, 699 F.2d 803 (6th Cir. 1983) 19, 22

United States v. Sheiner, 410 F.2d 337 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969) 13

United States v. Waldman, 579 F.2d 649 (1st Cir. 1978) 22

United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973) 13

Wood v. Georgia, 450 U.S. 261 (1981) 10

Constitution, statutes and rules

PAGE

United States Constitution:

Fifth Amendment (Due Process Clause) 5

Sixth Amendment 2, 5, 6, 7, 9, 11, 12, 14, 15, 21, 22, 26

Fourteenth Amendment (Due Process Clause) 14

18 U.S.C. § 207 20

18 U.S.C. § 207(b) 20

18 U.S.C. § 241 3

18 U.S.C. § 242 3

Sup. Ct. R. 36.2 1

Fed. R. Crim. P. 44(c) 3, 4, 6, 9, 10, 11, 21

Fed. R. Crim. P. 44(c) advisory committee note 11

E. D. Pa. R. 14(iv)(B) 16

Pa. R. D. E. 102 16

Other authorities

Model Code of Professional Responsibility (1980):

Canon 1 20

Canon 9 20

DR 1-102 (A)(3), (5) 20

DR 5-105 .....16, 17

DR 5-105 (C) 16, 17

EC 5-16 18

EC 5-17 17

DR 9-101 (B) 20

PAGE

Standards Relating to the Prosecution Function and the Defense Function (1971):

Defense Function § 3.5 ..... 5, 18

Defense Function § 3.5 commentary 17

Books and law reviews

Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244 (1981) 17

H. Drinker, *Legal Ethics* (1953) 17

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P. W. Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 Geo. L. J. 1075 (1979) 22

In the Supreme Court of the United States

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The National Association of Criminal Defense Lawyers (NACDL) and the National Legal Aid and Defender Association (NLADA) submit this brief as amici curiae with consent of petitioners and respondent[1] in support of peti-

[1] Copies of the petitioners' letter of consent dated February 16, 1983 and respondent's letter of consent dated January 17, 1983 have been submitted to the Clerk of this Court along with this brief, pursuant to Sup. Ct. R. 36.2.

tioners Robert Flanagan, James Keweshan, Sidney Landis and Thomas McNamee. Amici urge that the decision of the Court of Appeals for the Third Circuit in these proceedings, *United States* v. *Flanagan*, 679 F.2d 1072 (3d Cir. 1982) (Pet. App. A1-A11),[2] be reversed.

INTEREST OF AMICI

The two organizations submitting this brief as amici curiae, the NACDL and the NLADA, represent lawyers, judges and others interested in our criminal justice system. The NACDL is a District of Columbia non-profit corporation with a membership of more than 2200 criminal defense lawyers, law professors and judges. Among the NACDL's stated objectives are the promotion and proper administration of criminal justice. The NLADA is a non-profit organization of public defender offices, legal services agencies and 2000 individual members, most of whom are engaged in private practice. Since 1911, the primary purpose of the NLADA has been to expand and improve the quality of legal services for the nation's poor.

Amici filed a brief supporting petitioners' cause in the appellate proceedings below. Because the question presented is of significant and general concern in the field of criminal law, amici respectfully submit this brief for the Court's consideration.

CONSTITUTIONAL PROVISION

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

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[2] The petitioners' Appendix, bound together with their Petition for Writ of Certiorari, will be referred to in this brief as "Pet. App."

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

The Indictment

Petitioners are police officers in the Philadelphia Police Department and were members of that department's undercover team known as the "grandpop" squad, whose purpose was to apprehend perpetrators of street crimes. The squad's nickname arose from the fact that one of the officers would pose as an aged or infirm potential victim to attract assailants. In connection with their activities on this squad, a grand jury charged petitioners with conspiracy to violate the civil rights of citizens by arresting persons without probable cause and with substantive civil rights offenses stemming from false arrest or physical abuse. *See* 18 U.S.C. §§ 241, 242.

During the grand jury investigation, the officers retained the Philadelphia law firm of Sprague & Rubenstone. After meetings with the officers individually and as a group, their lawyers undertook to represent each of them throughout these proceedings.

The Motion For Disqualification

Soon after the return of the indictment, the government filed its Motion for a Hearing and to Prohibit Multiple Representation, seeking to disqualify the law firm from representing more than one of the police officers. Pursuant to Fed. R. Crim. P. 44(c), the district court held a hearing on disqualification, engaging in a lengthy colloquy with

each officer (Pet. App. A36-A76). Each officer, acknowledging the court's specific warning that joint counsel might not be able to differentiate his level of involvement from the other officers' or to cross-examine a co-defendant who became a witness against him, stated that he believed that no member of the team was guilty of the charges and that the defense he intended to present with his colleagues was a united one (Pet. App. A46-A48, A52-A54, A56-A59, A62-A66). Post-hearing briefs, solicited by the court, were submitted by the parties.

The District Court's Disqualification Order

After the hearing, the district court found that a conflict of interest was likely to arise at some future point in the proceedings (Pet. App. A16, A26). Based upon the officers' pre-trial motions, including the motion of three of them for severance from the fourth, the district court concluded that it was likely that one or more officer would wish to distinguish his activities from the other officers' (Pet. App. A17-A18). Noting that proof of the mens rea requisite for the charged offenses would depend upon the government's ability to establish each officer's oral statements, the court speculated that cross-examination of hearsay witnesses potentially might be impeded by counsel's obligation to preserve confidences of each client (Pet. App. A18).

Based upon what the court characterized as "extensive discussions" with each petitioner at the Rule 44(c) hearing (Pet. App. A14), the court concluded that each officer was fully and completely aware of the potential for conflicts; that each understood that separate counsel could present a joint defense, as well as separate defenses; that financial consideration played no part in each officer's decision; and that each officer wished to be represented jointly (Pet.

App. A15). The district court concluded that each petitioner's waiver of separate counsel was voluntary, knowing and intelligent (Pet. App. A16).

Notwithstanding the knowing waivers and the planned joint defense, the district court concluded that the petitioners' decisions must yield to the court's authority to supervise the conduct of members of the bar (Pet. App. A21, A25). The trial court held that disqualification was necessary to protect the petitioners' rights to effective assistance of counsel and to preserve the integrity of court procedures (Pet. App. A28). The court found that prevailing standards of professional ethics were set forth in the *Standards Relating to the Defense Function* § 3.5 and required that counsel not undertake joint representation in this case (Pet. App. A26-A27). Additionally, the court found that a conviction might be overturned on appeal if the adequacy of waiver were challenged (Pet. App. A25, A27).

The district court concluded that the firm would be disqualified from representing the officers jointly and from continuing to represent any one of them individually.[3]

The Court Of Appeals' Affirmance

The Court of Appeals for the Third Circuit, holding that the Sixth Amendment and the Due Process Clause of the Fifth Amendment afford no greater protection than "preventing *arbitrary* dismissal of the chosen attorney" (Pet. App. A8) (emphasis added), affirmed the district court. Rejecting part of the district court's analysis, the Court of Appeals stated that a "truly knowing and intelligent

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[3] Amici take no position in this brief whether the firm of Sprague & Rubenstone should be allowed to represent one of the petitioners if disqualified from representing them jointly.

waiver accepted by the court will insulate a conviction from later attack" (Pet. App. A9). The appellate court held, however, that a court's "concerns about breaches of professional ethics and about respect for the integrity of the court" justified disqualification as an appropriate measure under Rule 44(c) where an actual conflict was likely to "materialize" (Pet. App. A10).

SUMMARY OF ARGUMENT

Petitioners wish to forego separate counsel at their joint trial on charges that they, as a team of police officers, together violated the civil rights of citizens. Aware that the court and prosecutor perceived that their joint defense might favor one of their number at the expense of another, they nevertheless chose to speak with one voice. The lower court, however, in an exercise of its authority to supervise the conduct of attorneys, required them to obtain separate counsel, although not necessarily to present separate defenses.

Although the Sixth Amendment requires reversal of a conviction when counsel whose loyalty is split between conflicting interests is imposed unwittingly upon a defendant, it does not permit a court to reject an accused's free and knowing choice to be represented by counsel together with his co-defendants. Indeed, on account of the inestimable value of free choice, this Court has held that a layman charged with a serious crime has an absolute right knowingly to forego the assistance of counsel, although he may not be forced to do so, and he may enter instead upon the dangerous course of self-representation. The accused's free choice to present his defense through joint counsel cannot be rejected merely because professional ethics require caution and circumspection when a lawyer undertakes joint representation.

Rooted in speculation, the district court discovered authority to ensure fairness and ethical conduct and to overbear the petitioners' will. With no record evidence, the district court divined that petitioners' joint counsel might at some future point experience difficulties in cross-examining unidentified witnesses, prejudicial in an unspecified way, whereas separate counsel might not. Further, the court forecast—despite petitioners' affirmations to the contrary—that one or more of them might wish to differentiate himself from the rest in a way that joint counsel might not achieve, but separate counsel might.

The joint representation sought in this case does not constitute a violation of the *Model Code of Professional Responsibility*. Moreover, although the decision to be represented by counsel jointly with other co-defendants may be considered by some to be unwise, the courts cannot refuse to honor a knowing, voluntary and intelligent choice. Because the Sixth Amendment protects the right to choose counsel freely, the court and government can have no interest in an accused's choice of counsel. To deny petitioners in this case their right to joint representation is to deny them their constitutional guarantee of the assistance of counsel.

This case, in which the government raised the issue of disqualification by motion, is but one example of the numerous recent cases that reflect an increasing interest on the part of prosecutors in a defendant's choice of legal counsel.[4] Such motions now are widespread in cases in which a defense lawyer, representing one defendant, has represented a different co-defendant in prior proceedings,

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[4] *See generally* E. Margolin & S. Coliver, *Pretrial Disqualification of Criminal Defense Counsel*, 20 Am. Crim. L. Rev. 227 (1982) [hereinafter cited as Margolin & Coliver].

or previously has represented a government witness. The existence of these former relationships is commonplace for federal defenders and unavoidable in major federal criminal litigation, especially after lawyers have gained expertise. In addition, former government prosecutors representing criminal defendants often are targets of motions to disqualify.

Unlike the *Flanagan* case, the interest of third parties or the government in preventing disclosure or improper use of privileged information may be at issue under other circumstances. Although there is a great need to bring clarity to the balancing of interests in such cases, and to emphasize properly the strong interest of the defendant, *Flanagan* does not itself raise issues of such complexity.

The right of an accused facing imprisonment to decide the future of his defense, and knowingly to waive what some might call prejudice, must prevail over the interest of the government or the court in telling him that he and his lawyer are wrong.

ARGUMENT

I.

THE SIXTH AMENDMENT PROHIBITS A COURT FROM DISQUALIFYING JOINT COUNSEL, PURSUANT TO ITS AUTHORITY TO SUPERVISE THE CONDUCT OF ATTORNEYS, OVER AN ACCUSED'S KNOWING WAIVER OF POTENTIAL CONFLICTS OF INTEREST.

A. Fed. R. Crim. P. 44(c) Cannot Be Interpreted To Infringe The Accused's Right To Conduct His Defense Through Joint Counsel.

The trial judge in this case advised the petitioners that they had a right to separate counsel and discussed potential dangers of joint representation with them, as required by Fed. R. Crim. P. 44(c).[5] Neither the adequacy of the court's detailed inquiry nor the court's finding that each petitioner made a voluntary, knowing and intelligent waiver

[5] Fed. R. Crim. P. 44(c) reads as follows:

(c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

of his right to separate counsel has been challenged in these proceedings. Furthermore, petitioners have not disputed that, but for the fact that they knowingly have chosen to present a joint defense, their defenses might have diverged in this case. At issue is whether a conflict of interest is likely to arise, despite petitioners' assertions to the contrary, and whether disqualification of counsel is an "appropriate measure" under Rule 44 when the inadequacy of representation perceived by the court stems from the very fact that the petitioners have chosen joint representation.

Rule 44(c) established a procedure for the federal district courts to inquire whether defendants are aware of the potential danger of joint representation. Rule 44, which went into effect in 1980, simply implements what this Court has long held to be the duty of trial courts to make inquiries in cases of joint representation in order to protect the rights of a defendant. *E.g., Wood* v. *Georgia*, 450 U.S. 261, 272 (1981); *Cuyler* v. *Sullivan*, 446 U.S. 335, 347 (1980); *Glasser* v. *United States*, 315 U.S. 60, 71 (1942).

Despite the purpose of the rule, the procedure to be followed and the standards to be applied under it are not clear. Rule 44 requires that a court first determine whether a "conflict of interest is likely to arise," but defines neither "conflict of interest" nor "likely to arise." If the court finds that "good cause to believe no conflict of interest is likely to arise" is lacking, the court must take "such measures as may be appropriate to protect each defendant's right to counsel." It does not, however, identify the circumstances under which different alteratives are appropriate.

The distinction between "actual" and "potential" conflict, which decisions of the Court have established as the basis for deciding when, absent a waiver, an accused may assail a conviction on the ground of ineffective assistance of counsel, *e.g.*, *Cuyler* v. *Sullivan*, 446 U.S. at 348-49, provides no guidance for the district courts in the context of a pre-trial inquiry under Rule 44(c). If the trial court discusses waiver with an accused, and the accused gives a knowing, voluntary and intelligent waiver, the line of authority requiring reversal absent waiver is inapposite.

In undertaking to give meaning to Rule 44, a court obviously cannot interpret it to alter or infringe a defendant's constitutional rights. The wording of the rule does not mandate an unconstitutional interpretation. According to the Rule 44 Advisory Committee Notes, obtaining a waiver is an appropriate measure. Fed. R. Crim. P. 44(c) advisory committee note. When a defendant is not competent to make a knowing, voluntary and intelligent waiver, alternative appropriate measures may be taken. However, when a potential conflict of interest stems from aspects of their joint representation that defendants knowingly control, the only appropriate measure is to insure that they intend to waive any conflicts knowingly, voluntarily and intelligently, and that their waivers appear in the record.[6] Though Rule 44 does not specify it, the Sixth Amendment protects an accused's right to conduct his defense through joint counsel. Because of that protection, Rule 44 cannot be interpreted as authority to reject a knowing waiver.

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[6] The waiver, of course, must meet the constitutional standard of a knowing, voluntary and intelligent waiver. *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). In this case, the district court found that petitioners' waivers satisfied the constitutional standard (Pet. App. A16).

B. The Sixth Amendment Protects The Accused's Right To Conduct His Defense By Selection Of Joint Counsel.

1. The accused's right to conduct his defense through joint counsel is an independent right.

The Sixth Amendment does not provide that a defense shall be made for an accused against his will: Rather, "it grants to the accused personally the right to make his defense." *Faretta* v. *California*, 422 U.S. 806, 819 (1975). The necessary implication of the Amendment is that the accused enjoys the right to the assistance of counsel who will conduct the defense he chooses. Concommitantly, the profound choice whether to retain counsel singly or with his co-defendants is an essential part of an accused's Sixth Amendment right. This right cannot lightly be abridged.

An accused's Sixth Amendment rights include the right to determine his own defense. In *Faretta* v. *California*, the Court held that an accused's right to forego the assistance of counsel, and instead to represent himself on a felony charge, is an independent right of self-representation included within the protections of the Sixth Amendment. The Court found that the structure of the Amendment necessarily implied the right of self-representation because the rights enumerated in the Amendment, essential to a full defense, are given personally to an accused. *Id.* at 818. The Court held also that the Amendment's guarantee of counsel itself supports the conclusion that the rights belong to the defendant personally, because

> [i]t speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing

> defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.

Id. at 820.

An accused's right to decide whether his defense will be guided separately from his co-defendants or jointly with them must be included in his right to accept the assistance of counsel or to reject it altogether.[7] The right to select a particular attorney is "the most important decision a defendant makes in shaping his defense." *United States* v. *Laura*, 607 F.2d 52, 56 (3d Cir. 1979); *accord United States* v. *Curcio*, 694 F.2d 14, 25 (2d Cir. 1982). The choice of counsel is a significant decision because the attorney shapes defense strategies and has authority to make certain binding decisions. 607 F.2d at 56. Moreover, the choice will affect other constitutional rights because counsel will advise the accused to assert or relinquish other rights. *Id.* *See Brooks* v. *Tennessee*, 406 U.S. 605, 612 (1972).

The Court of Appeals for the Second Circuit has held that the right to choose joint counsel is an independent constitutional right. In *United States* v. *Curcio*, 694 F.2d at 22-23, 25-26, where two brothers sought to be represented by the same trial counsel, the appellate court held that waiver of the right to separate counsel could not be forbidden despite the considerable potential dangers of joint representation, if defendants act knowingly, because the right to counsel of one's choosing is of constitutional dimension. *Id.* at 22-23. *See also United States* v. *Curcio*, 680 F.2d 881, 884 (2d Cir. 1982); *United States* v. *Wisniewski*, 478 F.2d 274, 285 (2d Cir. 1973); *United States* v. *Sheiner*, 410 F.2d 337, 342 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969).

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[7] The right to joint counsel enjoys a long history. *E.g.*, *Glasser* v. *United States*, 315 U.S. 60; *Andersen* v. *Treat*, 172 U.S. 24 (1898).

2. Sixth Amendment protection of the accused's right to conduct his defense through joint counsel is absolute.

Given that decisions of this Court and of the Courts of Appeals establish that the Sixth Amendment protects the right of an accused to conduct the defense he chooses, including the important selection of joint counsel, the Court of Appeals in this case erroneously held that the Sixth Amendment affords protection only from "arbitrary" disqualification of counsel. The Court of Appeals relied upon *Davis* v. *Stamler*, 650 F.2d 477, 479 (3d Cir. 1981), which in turn refers to this Court's opinion in *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932).

The Court in *Powell* does, indeed, state that an "arbitrary" refusal to hear a party by counsel would violate due process:

> If in any case, civil or criminal, a state or federal court were *arbitrarily* to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id. (emphasis added). However, this statement is not the central holding in *Powell* and does not apply to the instant case.

In *Powell* (the Scottsboro case), several young black men were tried for capital rape of two white women without counsel and were convicted. The Court held that in a capital case, where a defendant is incapable of making an adequate defense, the Due Process Clause of the Fourteenth Amendment requires a state court to appoint counsel. *Id.* at 73.

Interpreted literally, the above-quoted passage would imply that a state court's failure to appoint counsel in a capital case was unconstitutional only if arbitrary, which was not the holding of *Powell*. Moreover, the passage does not focus upon the distinction between civil cases and criminal cases, where the Sixth Amendment is applicable. Nor does it clarify the difference between cases in which a party demands certain counsel for purposes of delay, or counsel who has been disbarred, and those in which the request for particular counsel is made in good faith. Finally, a criminal defendant's Sixth Amendment right to counsel has been expanded greatly since those words were written in *Powell*. *See Gideon* v. *Wainwright*, 372 U.S. 335 (1963), *overruling Betts* v. *Brady*, 316 U.S. 455 (1942).

The Court in *Powell* cannot have intended to imply that the Sixth Amendment protects only arbitrary disqualifications, under circumstances such as those presented here. Moreover, *Faretta* v. *California* dispels any uncertainty whether an accused's Sixth Amendment rights to determine his defense must be respected. Because the Sixth Amendment protects an accused's right to choose joint counsel to present his defense, interference with this decision cannot be justified.

C. Joint Representation Does Not Violate The Model Code Of Professional Responsibility.

The Court of Appeals for the Third Circuit concluded that the district court's "concerns about breaches of professional ethics and about respect for the integrity of the court" (Pet. App. A10) justified disqualification. The decision of the Court is not clear whether the conduct at issue violates a Disciplinary Rule of the *Model Code of Professional Responsibility* or whether it is merely unseemly (Pet. App. A10). In either instance, the Court is

incorrect. Furthermore, *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978), relied upon by the Court of Appeals in this case, is incorrect for the same reasons that the Court here is incorrect. In this Section, the *Model Code of Professional Responsibility* is discussed; the next Section, Part D, rejects the argument that disqualification can be justified by a heightened concern over ethics or a desire to protect an accused from himself.

1. The Model Code of Professional Responsibility requires the client's waiver.

The *Model Code of Professional Responsibility* (1980), which governs the conduct of all attorneys practicing before the courts of the Eastern District of Pennsylvania,[8] states clearly that a lawyer may represent multiple clients with conflicting interests if consent is obtained from each after full disclosure and "if it is obvious that he can adequately represent the interest of each." *Model Code of Professional Responsibility* DR 5-105 (C) (1980).[9] The *Code* does not proscribe joint representation and it recog-

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[8] E. D. Pa. R. 14(iv)(B) adopts the Pennsylvania Supreme Court's ethical code, the *Model Code of Professional Responsibility*. Pa. R. D. E. 102.

[9] DR 5-105 states in full:

> Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer
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> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105 (C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his

(footnote continued)

nizes that joint representation will not raise conflicts of interest in every case. *Model Code of Professional Responsibility* EC 5-17 (1980).

Furthermore, joint representation is regarded approvingly in some cases. Members of this Court have recognized its benefits. *Glasser* v. *United States*, 315 U.S. at 92 (Frankfurter, J., dissenting). The Court has not held joint representation to be unconstitutional. *E.g., Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978). Ethical codes and commentators upon ethics approve of joint representation. *Standards Relating to the Prosecution Function and the Defense Function, The Defense Function* § 3.5 commentary at 214 (1971); H. Drinker, *Legal Ethics* 103-31 (1953); *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1380-81 (1981). Probably most significant, the criminal defense bar finds joint representation ethical, and even necessary, in some cases. *See* Margolin & Coliver, *supra* n.4, at 253.

Not differentiating between civil cases, where the Sixth Amendment does not apply, and criminal cases, where it does, the *Code* embodies a view that counsel generally

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(footnote continued)

representation of another client, except to the extent permitted under DR 5-105 (C).

(C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or her firm may accept or continue such employment.

should decline to undertake joint representation, because of potential ethical difficulties. *See Model Code of Professional Responsibility* EC 5-16 (1980); *Standards Relating to the Prosecution Function and the Defense Function, The Defense Function* § 3.5 (1971). The concern reflected in the *Code* is that an accused may not elect joint representation knowingly, because counsel may not have told him of its potential dangers. Additionally, the *Code* reflects a concern that counsel may not be aware of conflicting interests and will be placed in an untenable position when a conflict arises.

The *Code* requires, however, only that clients and counsel confront the possibility of a conflict openly, and reach a resolution. The *Code* provides that a client knowingly may waive a conflict. As an additional requirement to protect the client, the *Code* provides that counsel should not undertake joint representation even after waiver if counsel believes that the representation he will render will not be "adequate." If there has been a waiver, counsel may be satisfied that the representation will be adequate, especially when the defendants desire a joint and harmonious defense. *See United States* v. *Curcio*, 694 F.2d at 28.

2. The courts erred in finding that an ethical conflict existed and that disqualification was justified on the record in this case.

The Court of Appeals for the Third Circuit was incorrect in holding that joint representation in this case would be proscribed by the *Model Code of Professional Responsibility*, because the waiver here was sufficient. The potential conflicts envisioned by the district court pertained primarily to the ability or inability of one or more of the petitioners, who were going to be tried jointly even if they

had separate counsel, to "distance" himself from the others.[10] Yet, the four petitioners, who are sophisticated, educated police officers, stated that they understood the risks of their joint representation, and voluntarily concluded that they wished joint representation; their lawyers, too, believed they could represent the petitioners adequately. In this case, petitioners' waivers were constitutionally sufficient; they knowingly chose to cast in their lots together. It is "obvious," as the *Code* requires, that joint representation would be adequate in this case.

Moreover, the factual record that was developed in this case does not support the conclusion that disqualification was appropriate. The only facts in the record establish that no conflict was likely to arise, since each petitioner stated that he believed his defense to be in harmony with the others' and that he intended to present it to the jury in that manner.

The party moving for disqualification must show that some specifically identifiable impropriety has occurred or will occur. *United States* v. *Mers*, No. 81-7777, slip op. at 2140 (11th Cir. Mar. 21, 1983); *United States* v. *Reese*, 699 F.2d 803, 805 (6th Cir. 1983); *Norton* v. *Tallahassee Memorial Hospital*, 689 F.2d 938, 941 (11th Cir. 1982). In rejecting the only facts in the record, the court and the government neither identified which petitioner's interest would diverge from the rest nor specified which witnesses would be ineffectively cross-examined.

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[10] If it is true that one or more petitioner would suffer cognizable prejudice simply from being tried with the others, the district court should have granted severance, which it declined to do in this case. Rather than taking the extreme step of disqualifying counsel, the court should have chosen the less intrusive alternative available to it, and should have granted severence. *See United States* v. *Agosto*, 675 F.2d 965, 970 (8th Cir.), *cert. denied, sub nom. Gustafson* v. *United States*, 103 S.Ct. 77 (1982).

When ethical conflicts of interest other than those arising from joint representation are created, an accused's constitutional right to select joint counsel may not prevent a court from disqualifying counsel. For example, if a defendant's selection of counsel would result in a violation of the Ethics in Government Act of 1978, 18 U.S.C. § 207, disqualification may be the correct result. *See United States* v. *Dorfman*, 542 F. Supp. 402, 410 (E.D. Ill. 1982).[11] Additionally, disqualification might be appropri-

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[11] The district court in the *Dorfman* case concluded that if a former United States attorney continued to represent defendant Dorfman, such conduct might violate the Ethics in Government Act, 18 U.S.C. § 207(b), which makes it a criminal offense for a former United States attorney to act as an attorney for any party other than the United States in any matter pending under his official responsibility while in government service. 542 F. Supp. at 410.

The district court concluded that it could prevent violations of Section 207(b) under Canon 1 and Canon 9 of the *Model Code of Professional Responsibility*. *Id.* Canon 1 provides that a lawyer must assist in maintaining the integrity of the legal profession and Disciplinary Rule 1-102 (A)(3) and (5) prohibits absolutely illegal conduct involving moral turpitude and conduct prejudicial to the administration of justice. Canon 9 provides that a lawyer must avoid even the appearance of impropriety and Disciplinary Rule 9-101 (B) prohibits acceptance of private employment in a matter in which a lawyer had substantial responsibility as a public employee. The district court expressed its confidence that if the former United States attorney were to represent defendant Dorfman, public confidence in the law and lawyers would be eroded. *Id.* The holding in *Dorfman* is premised on the fact that the obloquy of the so-called "revolving door" between public and private legal employment is of major concern to the legal profession and the public. Multiple representation of defendants in criminal cases, however, arouses no public outcry. None of the Disciplinary Rules or Ethical Considerations related to Canon 9 imply that multiple representation of willing defendants is an "appearance of impropriety" that must be avoided.

ate when necessary to prevent disclosure of secrets held by a former government attorney now representing a defendant. *See United States* v. *Miller*, 624 F.2d 1198, 1199 (3d Cir. 1980); *United States* v. *Ostrer*, 597 F.2d 337, 339-40 & n.5 (2d Cir. 1979). The defendant's ability to prevent disqualification when the conflict of interest pertains to his rights cannot empower him to force others to become victims of other types of ethical conflicts.[12] But the courts cannot, as has been done in this case, prevent a defendant from exercising his personal rights under the guise of elevating legal ethics.

The courts' erroneous assertion that joint representation will be unethical, made in order to reject a clear expression of an accused's Sixth Amendment right to conduct his defense by means of joint counsel, is simply a thinly-disguised means of telling the accused that the court thinks his choice of joint representation is a mistake. A court has no authority to dictate this decision to a defendant.

D. The Court Cannot Insist Upon Protecting The Accused From Theoretical Prejudice That He Has Waived.

If no violation of the *Model Code of Professional Responsibility* is at issue in this case, the trial court's "concerns about breaches of professional ethics and about respect for the integrity of the court" apparently stem from

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[12] *See also United States* v. *Agosto*, 675 F.2d 965, and *United States* v. *Cunningham*, 672 F.2d 1064 (2d Cir. 1982), where, in both cases, the courts necessarily considered the interests of former clients in protecting attorney-client privileges. In *Agosto*, the Court of Appeals noted that under Fed. R. Crim. P. 44(c) a court must "alleviate the effects of the conflict while interfering least with defendant's choice of counsel." 675 F.2d at 970.

a misconceived view that joint representation generally is less effective than separate representation. Decisions of this Court, however, make it clear that a trial court may not impose so-called protections upon an unwilling accused.

It is true that petitioners' claim that their right to select joint counsel overrides the court's interest in protecting their rights to conflict-free representation seems to run counter to several decisions of this Court. In *Holloway* v. *Arkansas* and *Glasser* v. *United States*, in which there were no waivers of potential prejudice, the Court acknowledged that joint representation sometimes results in disadvantage to an accused of such degree that the Sixth Amendment will not permit conviction to stand. 435 U.S. at 482; 315 U.S. at 70.

Yet, in spite of the fact that there may be disadvantages to joint representation so great that an accused could demand to have separate counsel appointed for him, this Court has recognized that an accused knowingly may waive his right to separate counsel. *Holloway* v. *Arkansas*, 435 U.S. at 482-83 & n.5; *Glasser* v. *United States*, 315 U.S. at 70.[13] The Court has never recognized that the district courts or the government may override a waiver of separate counsel, even in order to preserve rights of the accused.

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[13] *Accord United States* v. *Reese*, 699 F.2d at 805; *United States* v. *Curcio*, 694 F.2d at 26; *United States* v. *Curcio*, 680 F.2d at 886; *United States* v. *Agosto*, 675 F.2d at 970; *United States* v. *Cunningham*, 672 F.2d at 1073; *United States* v. *Alvarez*, 580 F.2d 1251, 1259 (5th Cir. 1978); *United States* v. *Cox*, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979); *United States* v. *Waldman*, 579 F.2d 649, 651 (1st Cir. 1978); *United States* v. *Armedo-Sarmiento*, 524 F.2d 591, 592 (2d Cir. 1975); *United States* v. *Garcia*, 517 F.2d 272, 276-77 (5th Cir. 1975); P. W. Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 Geo. L. J. 1075, 1130 (1979).

In another context, this Court has determined that the government's interests may equal the accused's interest in selection of the trial forum. In *Singer* v. *United States*, 380 U.S. 24, 37 (1965), the Court held that it was not unconstitutional to condition an accused's waiver of jury trial upon the consent of the government and court. The Court reasoned that the government was another party to the action with an interest in the choice of jury trial, since the jury is the tribunal regarded by the Constitution as most likely to produce a fair result. *Id.* at 37. Moreover, the Court found that, historically, bench trial was not valued highly. *Id.* at 30. Because it is premised upon the fact that the government, as another litigant, has an interest in the choice of trial forum, *Singer* provides no support for the assertion that either the court or the government has a cognizable interest in a defendant's decision regarding a matter affecting his rights alone.

Moreover, *Faretta* v. *California* rejects the notion that the interests of the court or government can be equivalent to the accused's in his selection of his defense. In spite of the fact that traditional benefits associated with the assistance of counsel are lost when an accused represents himself, 422 U.S. at 835, the Court found that the government could not impose these traditional benefits upon an unwilling accused. The court's and government's interest in maintaining the dignity and fairness of court proceedings, noted by the dissenting Justices, 422 U.S. at 845-47, were not considered worthy of discussion by the majority.

Faretta holds that the accused's knowing choice must govern in decisions affecting his personal right to conduct his defense:

> The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.

Faretta v. *California*, 422 U.S. at 833 34 (footnotes omitted). *Accord United States* v. *Curcio*, 694 F.2d at 25; *United States* v. *Garcia*, 517 F.2d at 278.

The inestimable value of free choice is strongly embedded in the Constitution. In *Adams* v. *United States ex rel. McCann*, 317 U.S. 269 (1942), where the Court held that an accused may waive his right to jury trial without advice of counsel, the Court found that the value of an accused's freedom must outweigh the value of protecting him:

> What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms. . . . When the administration of the criminal law. . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.

Id. at 279-80.

The legitimacy of our criminal justice system is grounded upon respect for the reasoned and considered choice of the accused in matters critical to him. It is the accused's life that will be affected directly by the outcome of a crimi-

nal trial. In countless other contexts, an accused is accorded the right and responsibility to waive what are contrived as protections for him. He may, for example, waive his right to remain silent, his right to confer with counsel, his right to the assistance of counsel at trial, his right to put the government to its proof and his right to be present at trial. His decisions in these circumstances are always respected if voluntary, knowing and intelligent.

There is no claim in this case that petitioners are not aware of theoretical defenses that they might make separately. There is no claim that they have not each knowingly waived separate counsel. Their decisions must be respected, although they may be foresaking protections to which they otherwise are entitled. The protection from unwilling joint representation, conceived as a benefit for an accused, cannot be perverted to prevent him from exercising his correlative right to conduct his own defense through joint counsel.

CONCLUSION

Unless the decision of the Court of Appeals is reversed, this Court will be placing its imprimatur on a process that allows an accused's enlightened self-interest to be disregarded. Overruling an accused's knowing choice of counsel, on the ground that counsel cannot adequately represent him, is especially troubling when his counsel is ousted as a result of the government's motion.[14] When an accused knowingly elects to be jointly represented by counsel, along with his co-defendants, and the only claim of conflict of interest stems from counsel's loyalty potentially being split between them, the Sixth Amendment

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[14] A government motion to disqualify on the ground of ethical conflict may in fact mask baser objectives. *See* Margolin & Coliver, *supra* n.4, at 229 (footnotes omitted):

> It is the author's opinion, based on familiarity with more than a dozen cases in which such disqualification "inquiries" have been filed, that the government's primary motive in bringing such motions is to disqualify the most competent lawyers and firms, with little regard for their reputation for ethical practice. This view is bolstered by the government practice of making selective disqualification motions against some of the defense counsel in a given case, and not other, generally less well-known attorneys, engaged in substantially the same potential conflic. Simply by inviting the court to consider whether any potential conflicts are likely to develop, the government can succeed in putting defense counsel "on trial," using the courts to compel counsel to disclose, explain and justify financial dealings with past clients, as well as the relation of one client to another, as a precondition for remaining counsel in a pending case.

A court that balances a defendant's right to choose counsel against "a likelihood of public suspicion" creates limitless opportunities for a prosecutor to eliminate strong adversaries. *See United States* v. *Hobson*, 672 F.2d 825, 828 (11th Cir.), *cert. denied*, 103 S.Ct. 208 (1982).

provides absolute protection for this choice. An accused's choice of joint counsel, in these circumstances, is his personal choice of the defense he will present.

Respectfully submitted,

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April 18, 1983

No. 82-374-CFY
Status: GRANTED

Title: Robert Flanagan, James Keweshan, Joseph Landis and Thomas McNamee, Petitioners
v.
United States

Docketed:
September 1, 1982

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Sprague, Richard A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 1 1982	G	Petition for writ of certiorari filed.
3	Sep 28 1982		Order extending time to file response to petition until November 1, 1982.
4	Nov 2 1982		Order further extending time to file response to petition until November 22, 1982.
5	Nov 26 1982		Brief of respondent United States in support of petition filed.
6	Dec 1 1982		DISTRIBUTED. January 7, 1983
7	Dec 20 1982	X	Reply brief of petitioner Robert Flanagan, et al. filed.
8	Jan 10 1983		Petition GRANTED.
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10	Jan 28 1983		Order extending time to file brief of petitioner on the merits until March 10, 1983.
11	Mar 4 1983		Order further extending time to file brief of petitioner on the merits until April 7, 1983.
12	Apr 7 1983		Order further extending time to file brief of petitioner on the merits until April 18, 1983.
13	Apr 18 1983		Joint appendix filed.
14	Apr 18 1983		Brief of petitioner Robert Flanagan, et al. filed.
15	Apr 19 1983		Brief amicus curiae of A.C.L.U. filed.
16	Apr 21 1983		Brief amicus curiae of Natl. Assn. of Crim. Defense Lawyers, et al. filed.
17	Apr 25 1983		Record filed.
18	Apr 25 1983		Certified copy of partial proceedings received.
19	May 2 1983		Record filed.
21	May 31 1983		Order extending time to file brief of respondent on the merits until June 27, 1983.
23	Jun 27 1983		Order further extending time to file brief of respondent on the merits until July 27, 1983.
24	Jul 27 1983		Order further extending time to file brief of respondent on the merits until August 26, 1983.
25	Aug 25 1983		Application for leave to file brief on merits in excess of the page limitation to WJB (A-141).
26	Aug 29 1983		Order granting same not to exceed 65 pages by Brennan, J
27	Aug 26 1983		Brief of respondent United States filed.
28	Sep 23 1983		Application for leave to exceed the page limits on reply brief on the merits filed with WJB (A-206).
29	Sep 23 1983		Order granting same not to exceed 35 pages by Brennan, J.
30	Oct 18 1983		CIRCULATED.

No. 82-374-CFY

Entry	Date	Note	Proceedings and Orders
31	Oct 24 1983		SET FOR ARGUMENT. Wednesday, November 30, 1983. (3rd case) (1 hour)
32	Nov 21 1983	X	Reply brief of petitioners Robert Flanagan, et al. filed.
33	Nov 30 1983		ARGUED.